Supreme Court, U.S.
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No. 06-___

In The

Supreme Court of the United States

INDUSTRIAL CLEARINGHOUSE, INC.,

Petitioner,

v.

JACKSON WALKER,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the provisions of 11 U.S.C. §554(c) regarding abandonment of claims may be ignored by Texas State Courts and the Fifth Circuit Court of Appeals.

2. Whether assets can be permanently trapped in a bankruptcy estate, never to be of use to anyone.

3. Whether a Texas State Court speculation about bankruptcy law should be binding on the Federal Courts.

PARTIES TO PROCEEDING BELOW

The parties to the proceedings below are Industrial Clearinghouse, Inc. (Coastal Plains, Inc., merged into Industrial Clearinghouse, Inc.), Plaintiff/Appellant/Cross-Appellee in the Courts below, and Jackson Walker, L.L.P., Defendant/Appellee/Cross-Appellant in the Courts below.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Industrial Clearinghouse, Inc., states that it is a privately held Texas corporation. None of its shares is held by a publicly traded company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO PROCEEDING BELOW	ii
CORPORATE DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
REASONS WHY CERTIORARI SHOULD BE GRANTED	10
I. THE PANEL DECISION BY THE FIFTH CIRCUIT COURT OF APPEALS DIRECTLY CONTRADICTS THE FINDINGS OF THAT COURT IN *COASTAL 1*	10
II. THE COURTS BELOW, AS AFFIRMED BY THE PANEL IN THE FIFTH CIRCUIT COURT, HAVE IGNORED THE EXPRESS PROVISIONS OF 11 U.S.C. §554	10
III. A RULE ALLOWING ASSETS TO BE PERMANENTLY TRAPPED IN A BANKRUPTCY ESTATE NEVER TO BE OF USE TO ANYONE SERVES NO BENEFICIAL SOCIAL POLICY	14
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 125 S. Ct. 1517 (2005) 10

In re Coastal Plains, Inc., 179 F.3d 197 (5th Cir. 1999) 4, 6, 8, 9, 10

In re Herzig, 96 B.R. 264 (8th Cir. BAP 1989) 14

In re Lopez, 283 B.R. 22 (9th Cir. BAP 2002) 14

In re Winburn, 167 B.R. 673 (Bankr. N.D. Fla. 1993) 11

In re Woods, 173 F.3d 770 (10th Cir. 1999) 12

Shirley v. McCraney, 241 F. Supp. 2d 677 (S.D. Miss. 2001, aff'd, 48 Fed. Appx. 107) 5, 12

Starrett v. Starrett, 541 A.2d 1119 (N.J. 1998) 11

STATUTES

11 U.S.C. §521(a) 11

11 U.S.C. §530(a) 13

11 U.S.C. §554 10

11 U.S.C. §554(c) ..... *passim*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is attached. *See* App. at pages 1-3. The opinion of the United States District Court for the Northern District of Texas is attached hereto at App. pages 4-19 and the Orders of the United States Bankruptcy Court for the Northern District of Texas are attached hereto at App. pages 29-38, 39-42.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on June 12, 2006. App. at pages 1-3. It denied rehearing *en banc* on July 19, 2006. App. at pages 44-45. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This appeal from a bankruptcy matter involves provisions of 11 U.S.C. §554(c) regarding abandonment of claims.

STATEMENT OF THE CASE

In April 1986, Coastal Plains, Inc. ("Coastal Plains") filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Northern District of Texas. Jackson Walker, LLP ("Jackson Walker") was employed, with bankruptcy court approval, as legal counsel for

Coastal Plains, and served in that capacity throughout the time Coastal Plains was in Chapter 11.

A week after the bankruptcy case was commenced, Jackson Walker prepared and filed an adversary proceeding on behalf of Coastal Plains against Browning Manufacturing ("the Browning Adversary").

Shortly after the Browning Adversary was filed, the bankruptcy court, in a TRO hearing, found that Browning had breached certain contracts and violated the bankruptcy automatic stay. In granting the TRO, the court held that there was a probability that Coastal Plains would prevail on the merits in the adversary proceeding and ordered Browning to return the inventory to Coastal. Jackson Walker represented Coastal Plains in this hearing.

In June 1986, with Jackson Walker's legal guidance, Coastal Plains filed its bankruptcy Schedules and Statement of Financial Affairs. Despite having already prepared and filed the Browning Adversary on behalf of Coastal Plains, and already having received a favorable Court ruling, Jackson Walker did not list any claims against Browning in the Coastal Plains Bankruptcy Schedules or Statement of Financial Affairs.

Several months later, Westinghouse Credit Corporation (WC) – Coastal's major secured creditor – obtained relief from the automatic stay and foreclosed on Coastal's assets. At the foreclosure, WC purchased all Coastal's assets. Later, WC sold some of the assets, including Coastal's contract claims against Browning, to Industrial Clearinghouse, Inc. ("ICHI"). Throughout this time, the adversary action against Browning remained on file, and the parties were moving forward with that action. The

bankruptcy was converted to a Chapter 7 liquidation in Spring 1987. ICHI was thereafter substituted as the plaintiff on the adversary claims against Browning.

The adversary action was referred to the district court for trial. In May 1993, just days before a scheduled jury trial was to commence, Coastal's trustee in bankruptcy filed a motion questioning who owned the claims against Browning. The district court returned the case to bankruptcy court to decide the trustee's question. In the bankruptcy court, Browning asserted defenses of *res judicata* and equitable and judicial estoppel. The *res judicata* and estoppel defenses were based on the fact that Coastal (1) had failed to list the pending adversary action as a contingent claim and (2) had stipulated to WC's proposed findings in connection with the lift stay proceeding, in a document that failed to list any claim against Browning.

After the bankruptcy court held that ICHI owned Coastal's contact claims and the trustee owned Coastal's tort claims, ICHI and the trustee settled on an 85/15 split of any recovery, with ICHI responsible for all costs and attorneys' fees. The bankruptcy court approved the settlement and ruled against Browning's *res judicata* and estoppel defenses.

Browning appealed that ruling to the district court and then to the United States Court of Appeals for the Fifth Circuit. That Court affirmed the settlement but found that the *res judicata* and estoppel questions were not ripe for appeal.

The case was tried in district court to a jury in 1996. The jury returned a multi-million dollar verdict for ICHI and the trustee finding, among other things, that Browning breached its contract, converted Coastal's inventory,

and acted with malice. The jury awarded substantial damages, including punitive damages, reflecting its findings that Browning had committed serious wrongdoing resulting in the destruction of Coastal as an on-going business. The district court ordered ICHI and the trustee to elect between contract and tort. They elected contract. The district court entered judgment accordingly. There has been no contention that the contract claims on which judgment was rendered were owned by the bankruptcy estate of Coastal Plains at the time of trial.

On appeal, a panel of the Fifth Circuit Court of Appeals reversed and rendered judgment for Browning, finding that the claims against Browning were barred by judicial estoppel as a matter of law. The estoppel holding was based on the fact that Jackson Walker did not list the claims against Browning in its bankruptcy schedules and failed to list the claims against Browning in a stipulation that led to the lift stay for WC to foreclose on the assets of Coastal. The panel rendered judgment against both trustee of Coastal's estate and ICHI based upon Coastal's actions. *See In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999) (Coastal 1). There has been no contention that the benefits denied ICHI and the trustee of Coastal Plains were derived from the contract claims.

In June 2000, a Supplement to Bankruptcy Schedule B-2 was filed on behalf of Coastal Plains that listed, *inter alia*, an unliquidated cause of action for professional malpractice against Jackson Walker. App. at pages 52-54. Damages were estimated at $10 million (the value of the lost Browning judgment, plus interest). The trustee was served with the Supplement. The trustee made no attempt to prosecute or administer the malpractice claims. On December 12, 2000, the bankruptcy case was closed as a

"no asset" estate, and the trustee was discharged. App. at pages 57-58.

In 2001, ICHI/CP[1] sued Jackson Walker in the District Court of Dallas County, Texas, 116th Judicial District, Cause Number 01-03461-F, for professional malpractice. ("State Court Case"). ICHI/CP claimed that the unadministered malpractice claim had been abandoned pursuant to 11 U.S.C. § 554(c).[2] However, Jackson Walker received a summary judgment in the State Court Case on the grounds that the malpractice claim remained trapped in the closed bankruptcy case and ignored the fact that the loss was on the contract claims.

Appellant, in an attempt to clarify the bizarre position taken by the State District Court, on May 30, 2003, filed a Motion to Reopen Case and for Determination that Appointment of a Trustee is Necessary to allow ICHI/CP to obtain clarification as to whether the malpractice claims against Jackson Walker were in fact trapped in the subject bankruptcy estate, and if so, to appoint a trustee and order an administration or abandonment of the malpractice claims. App. at pages 64-74.

On June 4, 2003, the bankruptcy court initially reopened the subject bankruptcy to examine the issues raised by ICHI/CP, but did not appoint a trustee.

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[1] ICHI and Coastal Plains merged. The Texas Secretary of State issued a Certificate of Merger on August 12, 2002.

[2] *See for example Shirley v. McCraney,* 241 F. Supp. 2d 677, 679 (S.D. Miss. 2001, aff'd, 48 Fed. Appx. 107). (Malpractice claim in which trustee took no action to participate was automatically abandoned to debtor at the closing of the estate pursuant to §554(c)).

On August 1, 2003, a hearing was held on a "Renewed Motion for Determination that Appointment of a Trustee is Necessary and a Motion to Abandon." Prior to the hearing no party had filed any opposition to the opening of the estate or the appointment of a trustee. At the hearing, Jackson Walker appeared, stating to the court that it had standing as a creditor, which was incorrect, and argued in favor of closing the estate without appointing a trustee. The court heard argument of counsel and received an Affidavit from former trustee Jeffrey H. Mims. App. at pages 81-83. No other evidence was submitted to the court because an evidentiary hearing had been scheduled for August 14, 2003, on the abandonment issue. ICHI/CP had subpoenaed Jeffrey H. Mims and others to testify. The bankruptcy court cancelled the hearing, issued an August 12, 2003, Order which closed the estate, and denied the requested abandonment and all other relief sought by ICHI/CP. App. at pages 39-42. On August 22, 2003, ICHI/CP made a Motion for Clarification or Reconsideration. Again, without any evidentiary hearing, the court denied all relief sought by ICHI/CP. App. at pages 29-38.

On April 18, 2005, the Dallas Court of Appeals affirmed the state court summary judgment in favor of Jackson Walker based upon an interpretation of 11 U.S.C. §554(c) that is inconsistent with the Fifth Circuit Court's decision in *Coastal 1*. App. at pages 20-28. The Dallas Court of Appeals held that post-petition claims, even if scheduled, can not be abandoned under 11 U.S.C. §554(c) because they are not "required" to be scheduled. In contrast, the Fifth Circuit Court in *Coastal 1* held that both the pre-petition and post-petition claims against Browning were required to be scheduled. In fact, the penalty imposed by this Court for not scheduling those claims was

the loss of the judgment. The Dallas Court of Appeals decision became final on December 2, 2005. App. at page 109.

By Memorandum Order signed May 31, 2005, the United States District Court below upheld the bankruptcy court's order denying ICHI/CP all relief. App. at pages 4-19. The Fifth Circuit appeal was from the district court Memorandum Order and the underlying bankruptcy court orders, which prevented the malpractice claims against Jackson Walker from being either administered and pursued by the estate, or abandoned in favor of the debtor, Coastal Plains.

On appeal, a panel of the Fifth Circuit Court of Appeals affirmed the rulings of the bankruptcy court and the district court stating that the panel was satisfied that neither the bankruptcy court nor the district court committed reversible error. The panel held that the state district court did not err in ruling that the malpractice claim against Jackson Walker was not abandoned when the bankruptcy case was closed. The panel held that ICHI had no standing to assert the malpractice claim. The panel held that although *res judicata*, an affirmative defense, was not pled or argued, it was applicable to bar Appellant's claims. The panel erroneously found that the debtor did not schedule a claim against Jackson Walker and held the fact that the trustee "considered pursuing" the claim against Jackson Walker amounted to an administration of the claim. Counsel for the trustee disputes trustee's claim that he was consulted by the trustee about the claims against Jackson Walker. App. at pages 79-80.

The bankruptcy court failed and refused to hold an evidentiary hearing on the issue of the abandonment or

administration of the Jackson Walker malpractice claim.[3] The only evidence accepted by the court, during argument by the attorneys, was an Affidavit of Jeffrey H. Mims. App. at pages 81-83.

Although the bankruptcy court refused to conduct an evidentiary hearing, the record still reflects four important facts, to wit:

- There is a substantial malpractice claim against Jackson Walker for its negligence in the representation of Coastal Plains. (See *Coastal 1*).
- The malpractice claim was scheduled in a Supplement to Bankruptcy Schedule B-2 and was called to the attention of the trustee. App. at pages 52-54.
- The trustee took no action to administer the malpractice claim. App. at pages 81-83.
- The estate was closed on December 12, 2000 as a "no-asset estate." App. at pages 57-58.

The negligence of Jackson Walker is highlighted by the Fifth Circuit Court in the following portion of the *Coastal 1* opinion:

> **As Coastal's bankruptcy attorney [with Jackson Walker] admitted at the July 1993 bankruptcy court hearing, it is very important that a debtor's bankruptcy schedules and statement of affairs be as accurate as possible, because that is the initial information**

[3] Appellant did make an offer of proof when its opportunity for an evidentiary hearing was denied. App. at pages 84-108.

> **upon which all creditors rely. (explanation added).**
>
> **But, at the July 1993 hearing, Coastal's bankruptcy attorney testified that the adversary proceeding against Browning was a contingent or unliquidated claim that should have been included on Coastal's schedules . . .**

Coastal 1, 179 F.3d at 197.

After *Coastal 1*, the malpractice claim was scheduled. App. at pages 52-54. But the claim was not thereafter "administered" – the trustee took no action to pursue it. App. at pages 55-56, 81-83.

The estate was closed on December 12, 2000, as a "no-asset" estate. App. at pages 57-58. On this date, Coastal Plains, Inc. the debtor, was a separate entity from ICHI.

After December 12, 2000, ICHI and Coastal Plains merged. The Articles of Merger are dated August 1, 2002, and were filed with the Texas Secretary of State on August 12, 2002.

After reopening the case for a short time, the bankruptcy court re-closed the case on August 12, 2003. It was the Bankruptcy's Court's intent to trap this claim in the closed estate. App. at pages 39-42.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. THE PANEL DECISION BY THE FIFTH CIRCUIT COURT OF APPEALS DIRECTLY CONTRADICTS THE FINDINGS OF THAT COURT IN *COASTAL 1.*

Appellant lost a multi-million dollar judgment by the Fifth Circuit Court's holding in *Coastal 1* that the failure by Jackson Walker as counsel for Coastal to list the claims against Browning in its bankruptcy Schedules and Statement of Financial Affairs and the failure to list the claims against Browning in a stipulation leading to the foreclosure by WC on the Coastal assets were fatal to ICHI and the trustee. The panel in this case held that the state court was correct in holding that post-petition claims, even if scheduled, cannot be abandoned under 11 U.S.C. §554(c) because they are not required to be scheduled. In contrast, the Fifth Circuit Court in *Coastal 1* held that both pre-petition and post-petition claims against Browning were required to be scheduled. In fact, Appellant paid the ultimate price for not scheduling those claims which was the loss of the entire multi-million dollar judgment. Further, the Federal Courts are not bound by such State Court rulings. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005).

II. THE COURTS BELOW, AS AFFIRMED BY THE PANEL IN THE FIFTH CIRCUIT COURT, HAVE IGNORED THE EXPRESS PROVISIONS OF 11 U.S.C. §554.

Congress has mandated that all assets scheduled in a debtor's schedule of assets that are not administered at the time of closing of the estate are automatically abandoned to

the debtor. 11 U.S.C. §554(c). The claim against Jackson Walker was scheduled in June of 2000 when a Supplement to Bankruptcy Schedule B-2 was filed on behalf of Coastal Plains that listed, among other things, the cause of action for professional malpractice against Jackson Walker. App. at pages 52-54. The panel faults Appellant for not objecting to the bankruptcy court order closing the case as a no-asset case December 12, 2000. The closing of the estate as a no-asset case is perfectly consistent with the normal application of §554(c), and anyone, Appellant included, is justified in assuming that the no-asset report was a recognition that the Jackson Walker claim had been abandoned to the debtor, Coastal Plains.

In the case of *In re Winburn*, 167 B.R. 673 (Bankr. N.D. Fla. 1993), the court held as follows:

> Sections 554(c) and 521(a) are clear and unambiguous. Reading the two sections together leads to the undeniable conclusions that the word "scheduled" in Section 554(c) connotes a *listing* of the asset in the debtor's schedule of assets and liabilities. . . . (emphasis added)

"**Administer**" under the bankruptcy code means "the liquidation or utilization of an asset." *Starrett v. Starrett*, 541 A.2d 1119, 1121 (N.J. 1998).

The *Starrett* court specifically held that any scheduled claim is abandoned if it is not actively administered at the time of the closing of the estate, even if the trustee had previously taken some action to pursue the claim.

The trustee decided not to pursue the malpractice claim. "I decided I would not pursue such a claim." App. at pages 81-83. The failure to take any action to pursue the claim is the antithesis of administration.

Abandonment of a scheduled, but unadministered asset is automatic under §554(c). *See Shirley v. McCraney*, 241 F. Supp. 2d 677, 679 (S.D. Miss. 2001, aff'd, 48 Fed. Appx. 107). (Malpractice claim in which trustee took no action to participate was automatically abandoned to debtor at the closing of the estate pursuant to §554(c)); *See* also *In re Woods*, 173 F.3d 770, 776 (10th Cir. 1999). (Under §554, a technical abandonment is necessarily the effect of the closing order, regardless of the trustee's intentions).

The underlying courts should have concluded and ruled that the malpractice claim had been abandoned under §554(c) "to the debtor," Coastal Plains.

Perhaps the merger of ICHI and Coastal Plains caused the underlying courts to reach improper legal conclusions. They make the misguided argument that the operation of §554(c) puts "form over substance" because "Industrial essentially seeks to have the claim transferred to itself as a result of a purported merger with the post-chapter 7 debtor entity." District Court Memorandum Opinion, App. at pages 4-19.

Both courts miss the point that §554(c) operates automatically "**at the time of the closing of the case**." The estate was closed on December 12, 2000 (App. at pages 57-58), so that is the critical date for any analysis.

On December 12, 2000, Coastal Plains, Inc. was a separate entity. The record establishes that ICHI and Coastal Plains adopted "Articles of Merger" dated August 1, 2002. These Articles were filed with the Texas Secretary of State on August 12, 2002.

Under §554(c), Coastal Plains should have had title to the malpractice claim long before the Articles of Merger was filed with and accepted by the Texas Secretary of State.

The merger of ICHI and Coastal Plains, post December 12, 2000, cannot retroactively impact the operation of §554(c). The underlying courts cannot eviscerate a federal bankruptcy statute based upon events occurring after the statute was to have automatically operated.

The district court's Memorandum Opinion reflects total confusion over the facts of the ICHI/Coastal Plains merger. The Court states: "Industrial obtained its interest in Coastal Plains via a purchase from Westinghouse in which it attempted to buy, among other things, the right to pursue the malpractice claims." District Court Memorandum Order at pg. 12 (App. at pages 4-19). The court then concludes: "This is precisely the type of assignment of malpractice claims prohibited by Texas public policy." The factual underpinning for this conclusion is wrong!

The bankruptcy court stridently re-closed the bankruptcy case with the stated intent of preventing the unadministered malpractice claim from ever being prosecuted by any party, not even the estate.

> "**The practical result [of the Order] is that the legal malpractice claim against Jackson Walker remains in the bankruptcy estate never to be unleashed.**" (explanation and emphasis added). Bankruptcy Order at p. 8 (App. at pages 29-38).

This was error.

The bankruptcy court can only close (or re-close) an estate after it is "fully administered." 11 U.S.C. §530(a)

("after an estate is fully administered the Court shall close the estate.") It is thus fundamental error to intentionally close an estate when an asset of that estate has not been fully administered. *In re Lopez*, 283 B.R. 22, 27 (9th Cir. BAP 2002). It is also error to deny to reopen a case when an asset of substance exists in the closed estate. *In re Herzig*, 96 B.R. 264, 266 (8th Cir. BAP 1989). Both errors were committed by the bankruptcy court, and were not corrected by the district court.

The concurring opinion in *In re Lopez*, speaks to the failure of a court to deal with an unadministered asset that may remain in the estate:

> **The worst thing the parties can do is to ignore the property of the estate problem. The worst thing a bankruptcy court can do is to frustrate the process by refusing to reopen and order the appointment of a trustee who can definitively deal with property of the estate.** 283 B.R. at 33.

The underlying courts have frustrated the process and done the "worst thing" possible.

Over a twenty-year time period, the Appellant has suffered the fate of losing on both sides of the same issue, based on the same fact pattern, and in the same courts.

III. A RULE ALLOWING ASSETS TO BE PERMANENTLY TRAPPED IN A BANKRUPTCY ESTATE NEVER TO BE OF USE TO ANYONE SERVES NO BENEFICIAL SOCIAL POLICY.

The social policy supporting the provisions of §554(c) of the Bankruptcy Code is clear. It seems obvious that when a bankruptcy is over any remaining assets not

administered should flow back to the debtor. There can be no benefit to the American legal system or to ordinary commercial activity for assets to be permanently trapped within a bankruptcy estate and of no use to anyone. That is the effect of the rulings below which have been affirmed by the panel of the United States Court of Appeals for the Fifth Circuit.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 05-10861

In the Matter of: COASTAL PLAINS, INC.

Debtor,

INDUSTRIAL CLEARINGHOUSE, INC.

Appellant-Cross-Appellee,

VERSUS

JACKSON WALKER

Appellee-Cross-Appellant.

Appeals from the United States District Court
For the Northern District of Texas
3:04-CV-174.

(Filed June 12, 2006)

Before GARWOOD, DAVIS, and GARZA, Circuit Judges.*

PER CURIAM:**

Based on our review of the record, the briefs of the parties and oral argument of counsel we are satisfied that

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* Judge Garza concurs in the judgment only.

** Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

neither the bankruptcy court nor the district court committed reversible error:

1. We reject appellant's argument that the bankruptcy court and district court erred in concluding that the malpractice case against Jackson Walker was not abandoned when the bankruptcy case was closed. The determination by the Texas state court that ICHI had no standing to assert this malpractice claim because it was not owned by appellant but rather remained in the bankruptcy proceeding is binding on appellant and precluded it from relitigating this issue in bankruptcy court.

We are also satisfied that the state court had jurisdiction to make this determination. The bankruptcy court's exclusive jurisdiction is quite narrow. As we held in the *City of Brady, TX v. Sanders*, 936 F.2d 212, 218 (5th Cir. 1991),

> Thus, under section 1471, the only aspect of the bankruptcy proceeding over which the district courts and their bankruptcy units have exclusive jurisdiction is "the bankruptcy petition itself." *In re Wood*, 825 F.2d 90, 92 (5th Cir. 1987). In other matters arising in or related to title 11 cases, unless the Code provides otherwise, state courts have concurrent jurisdiction, and bankruptcy courts are prohibited from relitigating these matters if the state courts have already resolved them.

The res judicata effect of the state court ruling is plain on the record and we are free to apply this doctrine even though appellees did not assert res judicata as an affirmative defense. See *Nagle v. Lee*, 807 F.2d 435, 438 (5th Cir. 1987) and *American Furniture Co. v. International Accommodations Supply*, 721 F.2d 478, 482 (5th Cir. 1981).

2. The bankruptcy court did not abuse its discretion in refusing to reopen the bankruptcy case. Although the debtor did not schedule the claim against Jackson Walker as an asset, before the bankruptcy case was closed on December 12, 2000, the trustee considered pursuing the claim against Jackson Walker and declined to do so. Neither Coastal Plains, Inc. or Industrial Clearinghouse, Inc. objected to the bankruptcy court's order closing the case as a no asset case. Appellant did not seek to reopen the bankruptcy case until May 30, 2003 after the state court dismissed its malpractice claim. The bankruptcy court did not abuse its discretion in concluding that there was no cause to reopen the proceeding where "a purchaser of assets that were once estate assets is not happy with the trustee's decision regarding the administration of one of the estate's alleged assets."

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE COASTAL PLAINS, INC.	§	
Plaintiff,	§	
	§	CIVIL ACTION NO. 3:
V.	§	04-CV-0174-B
COASTAL PLAINS, INC., et al.,	§	(Bank. Ct. No.
	§	3-86-31299-HDH-7)
Defendant.	§	

MEMORANDUM ORDER

(Filed May 31, 2005)

Before the Court is an appeal by Industrial Clearinghouse, Inc. ("Industrial" or the "Appellant") from a final judgment of the bankruptcy court. Having conducted plenary review of the bankruptcy court's judgment, the Court **AFFIRMS** that judgment for the following reasons.

I. BACKGROUND[1]

This appeal arises out of Chapter 11 filings by Coastal Plains, Inc. ("Coastal Plains") in April 1986. (Appeal at 6; Response at 6). The Chapter 11 case ultimately converted to a Chapter 7 filing. (November 23, 2003 Order at 1). Industrial appeals the orders of the bankruptcy court Judge Harlan Hale finding that Industrial did not own a potential malpractice claim against the law firm Jackson Walker that was once part of the bankruptcy estate. The

[1] The facts are derived from the parties' pleadings and the evidence contained in the summary judgment record. Unless characterized as a contention by one of the parties, these facts are undisputed.

bankruptcy court found, as a matter of law, that a legal malpractice claim could not be abandoned by the Chapter 7 Trustee back to Coastal Plains and/ or Industrial. (Appeal at 4).

A. The Coastal Plains Bankruptcy.

Jackson Walker represented Debtor-in-Possession Coastal Plains in the Chapter 11 proceeding. (Appeal at 6; Response at 6). Jackson Walker also represented Coastal Plains in filing an adversary proceeding against its largest supplier, Browning Manufacturing ("Browning") (the "Browning Adversary"). (Appeal at 7; Response at 6). After a hearing on a proposed temporary restraining order ("TRO"), the bankruptcy court found that Browning had violated the automatic stay and ordered Browning to return Coastal Plains' inventory. (Appeal at 7; Response at 6).

Westinghouse, Coastal Plains' principal secured lender, received a super priority lien in return for providing debtor-in-possession financing the company. (Appeal at 6). Westinghouse ultimately moved to lift the automatic stay, submitting a stipulation (the "Stipulation") containing estimated values of Coastal Plains' assets, and its motion was granted. (Appeal at 7-8). Jackson Walker signed off on the Stipulation on behalf of Coastal Plains, and, according to the Appellant, failed to include the adversary claims against Browning. (Appeal at 7; Response at 7 n. 4). Westinghouse purchased Coastal Plains' assets in an auction held in October 1986. (*Id.*). In February of 1987, Industrial, purchased a portion of those assets, including the Browning Adversary claims which were valued at $1.[illegible] million. (*Id.* at 8).

B. The Browning Adversary.

In April of that year, the Chapter 11 case was converted into a Chapter 7 case and Duke Salisbury was appointed as the initial trustee, but later resigned and was replaced by Jeffrey Mims ("Mims"). (Appeal at 8, 10; Response at 8). During that same time period, Industrial was substituted for Coastal Plains as the named plaintiff in the Browning Adversary case, and the law firm of Baker, Mills, & Glast replaced Jackson Walker as counsel in that case. (Appeal at 8). (Appeal at 8) [sic]. The Browning Adversary had originally been referred by the district court to the bankruptcy court. Judge Solis of the Northern District of Texas withdrew the reference and set the Browning Adversary for trial in district court in May of 1993. (Appeal at 8). Just before trial, however, Coastal Plains' Chapter 7 Trustee moved to intervene, claiming that the proper plaintiff was the Coastal Plains bankruptcy estate. (*Id.*). Judge Solis referred the issue of ownership of the claims against Browning to the bankruptcy court for determination. (Appeal at 8-9).

After a three separate related hearings, in a memorandum order dated May 18, 1994, the bankruptcy court, Judge McGuire presiding, found that the Coastal Plains bankruptcy estate owned the tort claims against Browning, and that Industrial owned the contract claims. (*Id.*). The bankruptcy court subsequently approved an agreement between the Trustee and Industrial to split any recovery against Browning 15% (the Estate) to 85% (Industrial), but Browning appealed the validity of the agreement and ultimately won its appeal before the Fifth Circuit. (Appeal at 10).

Finally, in early 1996, the Browning Adversary Proceeding was tried before district Judge Solis in a jury trial, and the jury found against Browning, awarding Industrial and the Trustee jointly $5 million for breach of contract, $2.5 million for conversion, $1.75 million for breach of fiduciary duty, $1.3 million for tortious interference, and $7.5 million in punitive damages. (Appeal at 10). The district court modified the verdict, however, and ordered Industrial and the Trustee to elect a single recovery between the tort and contract awards and also reduced the punitive damages award to $4 million and granted Browning a $1.4 million setoff. (Appeal at 10).

Browning appealed the judgment, and the Fifth Circuit reversed and rendered in Browning's favor, holding that all claims, other than the tortious interference claim, were judicially estopped because the claims were not properly disclosed in Coastal Plains' bankruptcy schedules or the Stipulation, both of which were submitted by Jackson Walker on behalf of Coastal Plains. (Appeal at 11); *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999).

C. The Bankruptcy Case is Closed.

The Trustee, Mims, filed his Final Report on March 2, 2000. (Response at 8-9; Appeal at 11; Mims Affidavit). In the report, the Trustee did not mention a potential malpractice claim against Jackson Walker, and instead listed any potential lawsuit value at zero. (*Id.*). Additionally, the column of the schedule which would indicate an intent to abandon any assets under Bankruptcy Code sections 554(a) or (c) was left blank. Neither Coastal Plains nor Industrial objected at the time the report was filed, but three months later, Industrial attempted to file a

"Schedule B-2" supplement to the report, including an "unliquidated cause of action" including a "claim for damages based upon professional malpractice against Jackson Walker, LLP." (Appeal at 8). On December 12, the bankruptcy case was closed and Mims was discharged as Trustee. (Appeal at 12).

D. Industrial Sues Jackson Walker in Texas State Court.

Six months after the close of the bankruptcy case, Industrial sued Jackson Walker for professional malpractice in the Texas state district court, alleging that the law firm engaged in malpractice in its representation of Industrial prior to the merger and in its representation of Coastal Plains in the bankruptcy case. (Appeal at 12). The crux of the alleged malpractice claims against Jackson Walker lies in the fact that Jackson Walker represented Coastal Plains, Industrial,[2] and Westinghouse all during the same time period, but failed to disclose its conflicting relationship to the bankruptcy court. (Appeal at 7-8; May 18, 1994 Memorandum Opinion).

Industrial claims that, following its purchase of Coastal Plains assets, it merged with the company to form one surviving corporation, but Jackson Walker disputes the validity of any merger. (Appeal at 12; Response at 10). On January 6, 2003, the state court granted Jackson Walker's motion for summary judgment against Industrial. (Appeal at 12; Response at 3).

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[2] Jackson Walker initially incorporated Industrial under another name. (Appeal at 8).

E. Industrial Moves to Reopen the Bankruptcy Case.

Industrial sought to reopen the bankruptcy case in May 2003, filing a "Motion to Reopen Case and for Determination that Appointment of a Trustee is Necessary" ("Motion to Reopen") in the bankruptcy court, in an alleged attempt to "obtain clarification as to whether the malpractice claims against Jackson Walker remained property of the subject bankruptcy estate, and if so to order an abandonment of the malpractice claims to [Industrial]." (Motion to Reopen).

On June 4, 2003, the bankruptcy court, Judge Hale presiding, reopened the case to examine the ownership issue. (Appeal at 12; Response at 4). No trustee was appointed at the time. (*Id.*). Industrial filed a "Renewed Motion for Determination that Appointment of a Trustee is Necessary and a Motion to Abandon." (Appeal at 12; Response at 3). The bankruptcy court held a hearing on the on [sic] August 1, 2003. (Appeal at 12; Response at 4). At the hearing, attorneys for Jackson Walker argued that the case had been wrongly reopened. (Appeal at 12; Response at 4). According to Industrial, the bankruptcy court did not review any evidence at the hearing aside from an affidavit from Mims, the former Trustee. (Appeal at 12).

Following the hearing, Jackson Walker filed a written response to Industrial's motion "to reflect its August 1 positions and to respond to the issues scheduled for August 14." (Response at 4). The bankruptcy court reviewed the briefing, and, although it had originally scheduled an evidentiary hearing on the issue of abandonment for August 14, 2003, it issued an order on August 12, 2003 closing the estate, denying Industrial's requested abandonment and cancelled the hearing as moot. (Appeal at 13;

Response at 3-4). The Court found that its order to administratively reopen the case had been "improvidently granted," and that the Chapter 7 Trustee was aware of the potential malpractice claim and chose not to pursuit [sic] it, without any objection or appeal by Industrial. (August 14, 2003 Order; Response at 5-6).

Industrial then moved for clarification and reconsideration on August 22, 2003, and the bankruptcy court issued a separate order. (November 23, 2003 Order). In that order, the bankruptcy court denied the motion for reconsideration and explained that granting abandonment of the legal malpractice claim would "have the effect of an assignment" and be "contrary to public policy in Texas and therefore would not be permitted under § 554 of the Bankruptcy Code." (*Id.*).

Industrial filed the instant appeal on February 13, 2004, seeking a reversal of the bankruptcy court's decision regarding abandonment, as well as its decisions not to appoint a trustee and to re-close the case. *See generally,* (Appeal). In the alternative, Industrial claims that the bankruptcy court erred by failing to hold an evidentiary hearing on the issue of abandonment. (*Id.*). Jackson Walker filed its response on March 4, 2004, seeking dismissal of the appeal for lack of subject matter jurisdiction, and, alternatively, seeking affirmation of the orders of the bankruptcy court. *See generally,* (Response).

II. ANALYSIS

A. Legal Standard.

Section 28 U.S.C. § 158(a)(1) and Federal Rule of Bankruptcy Procedure 8001(a) endow district courts with

jurisdiction over bankruptcy appeals such as the one presently before the Court. A district court reviewing a decision of the bankruptcy court engages in plenary review of the bankruptcy court's judgment, applying the standard of review "generally applied in federal court reviews," and "function[ing] as an appellate court." *Matter of Webb,* 954 F.2d 1102, 1103-04 (5th Cir. 1992); *Matter of Coston*, 991 F.2d 257, 261 n. 3 (5th Cir. 1993) (citations omitted). The district court must not, however, set aside the bankruptcy court's findings of fact unless it is "clearly erroneous," and must give due regard to the opportunity the Bankruptcy Court had to judge the witnesses' credibility. Webb, 954 F.2d at 1104; Fed. R. Bankr. P. 8013. Under the law of the Fifth Circuit, although there may be evidence supporting a certain finding of fact, it is clearly erroneous if, after reviewing all of the evidence, the district court "is left with a firm and definite conviction that a mistake has been committed." *Matter of Missionary Baptist Foundation of Am., Inc.*, 712 F.2d 206, 209 (5th Cir. 1983) (citations omitted). The district court applies *de novo* review to mixed questions of law and fact. *Matter of Nat'l Gypsum Co.*, 208 F.3d 498, 504 (5th Cir.).

B. The *Rooker-Feldman* Doctrine Does Not Apply.

The first issue on appeal is Jackson Walker's contention that this Court lacks subject matter jurisdiction to review the bankruptcy court's decision. Jackson Walker asserts that the *Rooker-Feldman* doctrine applies and requires dismissal of the entire appeal for lack of subject matter jurisdiction. (Response at 10-11). Essentially, the *Rooker-Feldman* doctrine prohibits lower federal courts from engaging in "appellate review of state court decisions."

In the Matter of Reitnauer, 152 F.3d 341, 343 (5th Cir. 1998) (citations omitted). The doctrine is inapplicable in the present situation, however. In *Matter of Meyerland Co.*, 960 F.2d 512, 516 (5th Cir. 1992), the Fifth Circuit stated that "[u]nder the *Rooker-Feldman* line of cases, federal statutes define 'final state court judgments' as those 'rendered by the highest court in which a decision could be had.'" *Id.* As discussed previously, Industrial's motion to reopen the bankruptcy case was filed after a ruling in the state district court; thus, this Court has subject matter jurisdiction over the instant appeal, and the *Rooker-Feldman* doctrine does not apply. The Court will therefore proceed to address the parties' arguments on appeal. Industrial raises three points of error by the bankruptcy court on appeal.

C. Administration of the Malpractice Claim.

Industrial claims that the bankruptcy court erred in finding that Coastal Plains' professional malpractice claim against Jackson Walker was administered by the Trustee. (Appeal at 13). The Court will explain Industrial's first point of error for purposes of clarity. The Court will not, however, decide whether the Trustee properly administered the potential malpractice claim because the appeal turns on another point which eliminates the need to address this point of error on appeal.

Bankruptcy law provides for automatic abandonment to the debtor of any scheduled property not properly administered upon the closing of the bankruptcy case. (Appeal at 13 (citing *In re Winburn*, 167 B.R. 673 (Bankr. N.D. Fla. 1993); 11 U.S.C. § 554(c)). According to Industrial, it is undisputed that the malpractice claim was

scheduled, that the claim was not administered, and was therefore automatically abandoned under section 554(c) of the Bankruptcy Code. (Appeal at 15) (citing *Starrett,* 541 A.3d at 1121, 1122).

In order to demonstrate that the claims were abandoned by operation of law, Industrial must demonstrate that the Trustee was aware of the claims against Jackson Walker as property of the bankruptcy estate "such that the court could impute an intent to abandon the asset upon the closing of the case." *Starrett,* 541 A.3d at 1121, 1122. Additionally, Industrial must also demonstrate that the claims were not actively administered at the time of the alleged abandonment. *Id.* Industrial claims that it met its burden by demonstrating at the August hearing that Mims was aware of the claim and yet took no action.[3]

In its November 24, 2003 Order, the bankruptcy court acknowledged that "The practical result [of the Order] is that the legal malpractice claim against Jackson Walker remains in the bankruptcy estate never to be unleashed." (November 24, 2003 Order at 8). Industrial cites *Kogman v. Herzig*, 96 B.R. 264, 266 (8th Cir. BAP 1989) for the proposition that the bankruptcy court had a duty to reopen the Coastal Plains' estate because there was prima facie proof that it had not been fully administered. *Id.*; (Appeal at 19). Moreover, Industrial contends that the bankruptcy's decision in re-closing the estate as it did amounted to an abuse of discretion – both because the

[3] On February 2, 2005, Industrial moved, without citation from any authority, to supplement its appeal with deposition testimony of Mims from a related case. The Court denies Industrial's motion, but notes that it has reviewed the proposed supplement and finds that the evidence would not affect the outcome of the Court's decision.

malpractice claim was an "asset of substance" and because the bankruptcy court made its decision on "an erroneous view of the law." *Kogman*, 96 B.R. at 266; (Appeal at 19).

In response to Industrial's arguments regarding abandonment, Jackson Walker asserts that the claim never belonged to Coastal Plains the debtor because it arose post-petition, and was instead the property of the bankruptcy estate. (Response at 19-20); 11 U.S.C. §541(a)(7); *In re C-Power Prod., Inc.*, 230 B.R. 800, 803 (Bankr. N.D. Tex. 1998) (Response at 21); 4 COLLIER ON BANKRUPTCY ¶521.06[3] [a] (15th rev. ed. 2002). Additionally, Jackson Walker claims that the malpractice claim was not properly scheduled, and that, in the alternative, if the Court finds that it was properly scheduled, then Trustee properly administered the claim. Because the post-petition malpractice claim was not required to be scheduled, Jackson Walker argues, it could not have been abandoned by operation of law. (Response at 21); *In re DeLash*, 260 B.R. 4, 9 (Bankr. E.D. Cal. 2000).

Second, Jackson Walker asserts that, in any event, the malpractice claim was not "properly scheduled" pursuant to Bankruptcy Code section 521(1), because (1) the "Supplement to Schedule B-2" that included a malpractice claim against Jackson Walker was improperly filed by the CEO of Industrial, not the Trustee of the Coastal Plains estate, (2) it was filed after the Court approved the Trustee's Final Report, which was filed without objection by Industrial, and (3) it was not served on any creditors of the estate. (Response at 21).

Third, Jackson Walker disputes Industrial's assertion that the claim against the firm was not administered

(Appeal at 14) as inconsistent with the state court findings, the bankruptcy court findings, and the presumption of full administration established by FED. R. BANKR. P. 5009. (Response at 22). Additionally, Jackson Walker, attacks Industrial's reliance upon *Starrett v. Starrett,* a case which Industrial cites in support of its analysis of the lack of administration. (Appeal at 14; Response at 22). In *Starrett*, the plaintiff had listed a pre-petition judgment in her asset schedule when she filed for bankruptcy. Years later, the plaintiff sought to enforce the judgment in state court after the bankruptcy estate had closed. The defendant husband argued that the judgment remained part of the bankruptcy estate, but the state court of appeals found that the judgment had been abandoned to the plaintiff because "the absence of active administration of the scheduled estate asset for nearly three years clearly impute[d] an intent to abandon the asset when the case was closed." 541 A.2d at 1123. Jackson Walker attempts to distinguish *Starrett* on the basis that the state appellate court found that there was an "absence of active administration of the asset," not that the Trustee "ceased" administration of the asset as was allegedly the case here. 541 A.2d at 1123.

Because the Court's affirmation of the bankruptcy court's decision turns on other grounds, as discussed below, the Court declines to address the issue of whether the property was properly administered.

D. The Bankruptcy Court Did not Err in Finding that Abandonment of the Malpractice Claim is Against Texas Public Policy.

The next issue is whether the bankruptcy court erred in finding that the malpractice claims could not be abandoned

because abandonment of such claims would be contrary to Texas public policy. In so holding, the bankruptcy stated:

> Any abandonment of the legal malpractice claim under § 554 of the Bankruptcy Code, either by a court appointed trustee or by operation of law, that would result in ICHI having the right to bring the legal malpractice claim against the former attorneys of Coastal Plains, Inc. Could have the effect of an assignment of that legal malpractice action. Such a result . . . is contrary to public policy in Texas and therefore would not be permitted under § 554 of the Bankruptcy Code.

(November 24, 2003 Order; Response at 25).

Jackson Walker argues that Coastal Plains was a defunct entity under Chapter 7 of the Bankruptcy of the Bankruptcy Code upon the closing of an estate; thus no estate assets could have been abandoned to the entity. (Response at 24; 11 U.S.C. § 727 (a) ; *Matter of Liberty Trust Co.*, 130 B.R. 467, 471 (W.D. Tex. 1991) (citations omitted) (finding that a corporate debtor is rendered "defunct" upon the close of a Chapter 7 bankruptcy case and abandoned assets thus remain with the Trustee). Industrial objects to Jackson Walker's characterization and argues that because Jackson Walker represented Coastal Plains during the Chapter 11 proceedings, as a debtor-in-possession, Coastal Plains, rather than the estate, was the firm's client. (*Id.*) Industrial cites an opinion of the bankruptcy court for the Northern District of Texas, *In re C-Power Prod., Inc.*, which held that, in post-petition malpractice claims, the client is the debtor or the debtor-in-possession, not the bankruptcy estate, and that the client alone may prosecute the claim. *Id.*, 230 B.R.

800, 803-04 (Bankr. N.D. Tex. 1998) (Felsenthal, J.). Industrial insists that, as a result of its alleged merger with Coastal Plains, Industrial is the client and thus owns the claim against Jackson Walker.

The Court agrees with the bankruptcy court, however, that Industrial's argument puts "form over substance." (November 24, 2003 Order at 8). The Court agrees with Jackson Walker and the bankruptcy court that Industrial essentially "seeks to have the claim transferred to itself as a result of a purported 'merger with the post-Chapter 7 debtor entity.' " (Response at 26, Citing November 24, 2003 Order). Industrial, not Coastal Plains, would then own the malpractice claim, violating the Texas legislature's primary policy concern that "assignments will lead to commercial marketing of claims and increased litigation." *Id.*; *Mallios v. Baker,* 11 S.W.3d at 157, 165 (Tex. 2000) (Hecht, J., concurring); *see also, In re C-Power Prod.,* 230 B.R. 800, 802-03 (Bankr. N.D. Tex. 1998) (finding that the malpractice claims of the debtor-in-possession could not be sold to a third party); *In re J.E. Marion, Inc.*, 199 B.R. 635, 637 (Bankr. N.D. Tex. 1998) (holding that post-petition legal malpractice claims of the debtor could be prosecuted by the trustee).

In the case relied upon by Industrial, *In re C-Power Prod., Inc.*, Judge Felsenthal of the bankruptcy court for the Northern District of Texas found that a debtor-in-possession could not transfer its legal malpractice claims to [sic] via sale to another entity, because, under Texas law, a client may not assign such a claim. 230 B.R. at 802-03. The Court finds Industrial's attempt to distinguish this case on the basis of its purported merger with Coastal Plains unavailing. Industrial obtained its interest in Coastal Plains via a purchase from Westinghouse in which

it attempted to buy, among other things, the right to pursue the malpractice claims. This is precisely the type of assignment of malpractice claims prohibited by Texas public policy. As Judge Felsenthal noted in *In re C-Power Prod., Inc.,* Texas law's restriction on the assignment of malpractice claims "removes from the general ownership interest the right to transfer property." Consequently, the Court AFFIRMS the bankruptcy court's November 24, 2003 Order and DENIES Industrial's appeal on the basis that abandonment to Industrial would constitute an impermissible assignment under Texas law. *Mallios v. Baker,* 11 S.W.3d at 157, 165 (Tex. 2000) (Hecht, J., concurring); *see also In re C-Power Prod., Inc.,* 230 B.R. 800, 803-04.

E. The Bankruptcy Court Did Not Err in Cancelling the Evidentiary Hearing on the Abandonment Issue.

Industrial argues, in the alternative to its first two points of error, that the bankruptcy court erred by not granting Industrial a hearing on the abandonment issue because there is an unresolved issue of material fact regarding the issue of abandonment. (Appeal at 19). Jackson Walker correctly points out, however, that the bankruptcy court was not required to grant Industrial an evidentiary hearing on either its request to reopen the case or to find abandonment. (Response at 27); *In re Canal St. Ltd. Partnership*, 269 B.R. 375, 380 (Bankr. 8th Cir. 2001) (holding bankruptcy courts are not required to hold hearings on motions to reopen bankruptcy cases); *In re Sunflower Racing, Inc.,* 226 B.R. 665, 672 (D. Kan. 1998) (holding that bankruptcy courts who already have a factual record need not conduct a hearing on a motion to

reopen a bankruptcy case). Furthermore, Industrial did not include in its Motion for Reconsideration and Clarification any evidence which it would have presented if it had been given the opportunity. (Response at 27-28). Finally, in its current appeal to this Court, Industrial has not pointed to any specific evidence nor described how any specific evidence would have affected the outcome if it had been presented at a hearing. (Response at 28). Because both the Federal Rules and the Bankruptcy Rules require a showing of harm from points of error regarding the exclusion of evidence, Jackson Walker contends that Industrial has no basis for reversal on this point. The Court agrees and AFFIRMS the decision of the district court in not granting Industrial an evidentiary hearing.

III. CONCLUSION

For the reasons discussed, the bankruptcy court's orders of August 14, 2003 and November 24, 2003 are AFFIRMED. Industrial's appeal is DENIED in its entirety.

SO ORDERED.

SIGNED May 31st, 2005

/s/ Jane J. Boyle
JANE J. BOYLE
UNITED STATES
DISTRICT JUDGE

AFFIRMED; Opinion Filed April 18, 2005.

[SEAL]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-03-01752-CV

INDUSTRIAL CLEARINGHOUSE, INC., Appellant

V.

JACKSON WALKER, L.L.P., Appellee

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 01-03461-F

OPINION

Before Justices Whittington, Bridges, and Francis
Opinion By Justice Francis

This is a legal malpractice action brought by appellant Industrial Clearinghouse, Inc. against appellee Jackson Walker, L.L.C. In its petition, appellant asserted malpractice claims on behalf of Coastal Plains, Inc. (as Coastal's successor in interest) as well as malpractice claims on its own behalf. After granting two partial summary judgments in favor of Jackson Walker, the trial court rendered a final take-nothing judgment against appellant. In two issues, appellant challenges the trial court's summary judgments with respect to Coastal's malpractice claims and its own malpractice claims against Jackson Walker.

For the reasons that follow, we affirm the trial court's judgment.

This lawsuit has its genesis in a bankruptcy proceeding filed in 1986. Jackson Walker represented Coastal as debtor in possession in the bankruptcy court. While Coastal's bankruptcy case was pending, appellant purchased several of Coastal's assets including its causes of action against Browning Manufacturing (Coastal's largest supplier). The Browning claims were tried in federal court and judgment was rendered in favor of Coastal/appellant. The judgment was ultimately reversed on appeal after the fifth circuit concluded Coastal/appellant were judicially estopped from asserting the claims because Coastal never disclosed the Browning claims in its bankruptcy schedules or in its stipulation for lifting the automatic bankruptcy stay to allow Coastal's largest secured creditor to foreclose on Coastal's assets.

After losing the Browning judgment, appellant filed this lawsuit on April 27, 2001 as Coastal's successor in interest. Appellant asserted Jackson Walker was negligent in failing to disclose the Browning claims to the bankruptcy court and never advised Coastal that the claims should have been disclosed. Appellant's petition was later amended to include a legal malpractice claim on appellant's own behalf. Specifically, appellant asserted that Jackson Walker negligently assisted it in purchasing the Browning claims by failing to disclose that the claims had not been scheduled in the bankruptcy proceeding or by failing to take the steps necessary to preserve the viability of these claims. Jackson Walker filed several motions for partial summary judgment, two of which the trial court granted. After appellant non-suited its remaining claim, the trial court rendered a final, take-nothing judgment

against it. Appellant timely filed this appeal challenging two of the trial court's partial summary judgments.

In its first issue, appellant contends the trial court erred in granting summary judgment (and denying its motion for new trial) with respect to the legal malpractice claims appellant brought on behalf of Coastal. Jackson Walker moved for summary judgment on these claims asserting, among other things, that appellant never acquired ownership of Coastal's malpractice claims because Coastal never acquired the claims from Coastal's bankruptcy estate. Appellant acknowledges the bankruptcy estate's initial ownership of the claims. It argues, however, that once the bankruptcy case was closed, the malpractice claims were abandoned to Coastal as a matter of law pursuant to 11 U.S.C. § 554(c). Jackson Walker, on the other hand, asserts Coastal's post-petition malpractice claims cannot be abandoned under section 554(c) because they were not property *required* to be scheduled under section 521(1). The question before us, then, is whether Coastal's malpractice claims against Jackson Walker are subject to automatic abandonment pursuant to section 554(c).

Because Jackson Walker moved for a traditional motion for summary judgment on these claims, it had the burden to demonstrate no genuine issues of material fact existed and that it was entitled to judgment as a matter of law. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The summary judgment evidence reveals that Coastal's claims against Jackson Walker arose after the filing of the original petition for bankruptcy. Such post-petition legal malpractice claims become the property of Coastal's bankruptcy estate. *See In re C-Power Products, Inc.*, 230 B.R. 800, 803 (N.D. Tex. 1998). Appellant,

however, relies on section 554(c) of the bankruptcy code in support of its position that the claims reverted to Coastal upon the closing of the bankruptcy case.

Section 554(c) of the bankruptcy code provides that absent a court order stating otherwise, any property scheduled under section 521(1) and not otherwise administered at the time of the closing of the case is automatically abandoned to the debtor. 11 U.S.C. § 554(c). Unlike sections 554(a) and 554(b), which apply to any property, section 554(c) is specifically limited to "any property scheduled under section 521(1)." 11 U.S.C. §554. The only property required to be scheduled under section 521(1) is that property that was owned by the debtor at the time of the filing of the petition for bankruptcy. *See* 4 COLLIER OF BANKRUPTCY ¶ 521.06[3][a] (15th rev. ed. 2002) (no general duty to amend schedules to list property acquired during a case, despite the fact that such property becomes property of the estate). Coastal's malpractice claims against Jackson Walker arose after the bankruptcy petition was filed, were not owned by Coastal at the time the petition was filed, and therefore were not required to be scheduled under 521(1). Because such post-petition property is not "property scheduled under 521(1)," it is not subject to the technical abandonment provisions of 554(c). In reaching this conclusion, we find *In re DeLash*, 260 BR. 4, 9 (ED. Cal. 2000) persuasive.

In *DeLash*, the court addressed the issue of who was entitled to reopen a bankruptcy case for purposes of dealing with money received on a preference judgment after the case had been closed. Resolution of that question depended upon whether the preference judgment remained in the bankruptcy estate or whether it was abandoned to the

debtors at the closing of the bankruptcy case under section 554(c). *Id.* at 8.

After analyzing section 554 in its entirety, the court reasoned "if property of the estate in question is not of the type the debtor is required to schedule, it is not abandoned by operation of law when the ease is closed." *Id.* at 9. Concluding that the preferential transfer and preferential judgment were not required to be scheduled under 521(1), the court stated they could not be abandoned by operation of law under 554(c). In contrast to *DeLash*, appellant relies on *In re Kottmeier*, 240 B.R 440 (M.D. 1999) and *In re Menk*, 241 B.R. 896 (9th Cir. BAP 1999) to support its position that such post-petition claims may be abandoned under section 554(c). While these cases may suggest the possibility of a section 554(c) abandonment for post-petition property, there is little or no analysis accompanying their conclusions. We find the reasoning *of DeLash* persuasive and reject appellant's cases to the extent they suggest otherwise.

Here, like *DeLash*, post-petition malpractice claims were not required to be scheduled under 521(1). Accordingly, they were not subject to section 554(c)'s technical abandonment provisions and Coastal did not acquire the claims at the close of its bankruptcy case. Instead, the claims remain the property of the bankruptcy estate. Coastal's failure to acquire ownership of the malpractice case necessarily means that appellant does not own the claim as Coastal's successor. We therefore conclude the trial court did not err in granting summary judgment to Jackson Walker on Coastal's malpractice claim. We resolve appellant's first issue against it.

In its second issue, appellant challenges the trial court's summary judgment and denial of its motion for new trial with respect to its own malpractice claim against Jackson Walker. Specifically, appellant contends it presented sufficient evidence on each element of its claim to defeat Jackson Walker's no-evidence summary judgment motion. We review a no-evidence summary judgment under the same legal sufficiency standard used to review a directed verdict. *Gen. Mills Rests., Inc. v. Texas Wings, Inc.*, 12 S.W3d 827, 832-33 (Tex. App.-Dallas 2000, no pet.). We must therefore determine whether appellant produced more than a scintilla of probative evidence to raise a fact issue on the material questions presented. *Id.* at 833. When analyzing a no-evidence summary judgment, we consider the evidence in the light most favorable to the nonmovant. *See id.*

To prevail on its legal malpractice claim, appellant must show (1) Jackson Walker owed appellant a duty, (2) Jackson Walker breached that duty, (3) the breach proximately caused appellant's injuries, and (4) damages occurred. *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113 (Tex. 2004). Although Jackson Walker's no-evidence summary judgment motion challenged each element of appellant's legal malpractice claim, we focus only on whether Industrial presented sufficient evidence on the element of proximate cause as this analysis is dispositive of this issue. Because appellant alleges that some failure on Jackson Walker's part caused the adverse result in the Browning litigation, it must produce evidence from which a jury may reasonably infer that the attorney's conduct caused the damages alleged. *See id.* at 117. In other words, appellant had to produce evidence to raise a fact issue as to whether the fifth circuit would have decided

the underlying Browning litigation differently if Jackson Walker had not been negligent. To meet this burden, appellant was required to present expert evidence explaining the legal significance of Jackson Walker's alleged failure and the impact of this failure on the fifth circuit ruling. *See id.* at 118. This it did not do.

Appellant first relies on the fifth circuit's June 18, 1999 opinion as evidence of causation. Specifically, it focuses on the fifth circuit's holding that appellant was judicially estopped from recovering the judgment as a result of the debtor Coastal's failure to disclose the Browning claims in Coastal's bankruptcy proceeding. The fifth circuit opinion, however, does not constitute expert evidence that Jackson Walker caused any damage to appellant. The opinion does not address the issue of legal malpractice on the part of Jackson Walker or connect any actions of Jackson Walker to appellant's alleged damages (the loss of the Browning judgment).

Appellant attempted to make such a connection through its expert, Richard Countiss. Appellant initially refers to Countiss's supplemental report in which he states that certain enumerated failures on the part of Jackson Walker were "either singularly or in combination . . . the proximate causes of damages to [appellant]." Appellant further directs us to Countiss's deposition where he states, "It was my opinion that Jackson Walker was negligent and that that negligence caused damage to Coastal/ICHI" and, "My first conclusion was that without the – without the negligence, the judgment probably would have been affirmed." The trial court, however, sustained Jackson Walker's objections to the "opinions of Countiss as to proximate cause or damage." Because appellant has not challenged the trial court's evidentiary ruling on appeal,

we will not consider this evidence in our review. *See Valiance v. Irving C.A.R.E.S., Inc.*, 14 S.W.3d 833, 838 (Tex. App.-Dallas 2000, no pet.).

As additional evidence of causation, appellant cites extensively from an affidavit by Countiss attached to its motion for new trial. This affidavit was not before the trial court at the time of the summary judgment hearing and ruling. Generally, a party may not rely on new evidence in a motion for new trial unless it demonstrates the evidence was newly discovered and could not have been discovered through due diligence prior to the ruling on the summary judgment motion. *See McMahan v. Greenwood*, 108 S.W.3d 467, 500 (Tex App.-Hous. [14th Dist.] 2003, pet. denied) Appellant does not argue that the affidavit was newly discovered evidence and could not have been discovered through due diligence prior to the trial court's ruling. Instead, appellant asserts that because it was unaware the trial court was going to sustain Jackson Walker's objections until the trial court signed the order granting summary judgment, it must be given the opportunity to amend its summary judgment proof.

After the trial court sustained Jackson Walker's objection, appellant never requested by its motion for new trial, rehearing or otherwise the opportunity to amend its summary judgment evidence. Consequently, this complaint has not been preserved for review. In order to preserve a complaint for appellate review, a party must first present to the trial court a timely request, objection, or motion stating the specific grounds for the ruling it requests and obtain a ruling on that request. TEX. R. APP. P. 33.1.

Finally, appellant refers us to two other affidavits as evidence of causation. First, it presents the affidavit of Wayne Duke, appellant's CEO. Duke states that he consulted with Jackson Walker about possibly acquiring the Browning claims. While this evidence arguably raises a fact issue on the element of duty, it is irrelevant with respect to the issue of causation. Appellant also contends evidence of causation can be found in the affidavit of its bankruptcy expert Marillee Madan who states "leave to amend or supplement a bankruptcy schedule is freely given." Again, this evidence does not support a finding that Jackson Walker's action or inaction caused appellant damage. We resolve appellant's second issue against it.

We affirm the trial court's judgment.

/s/ Molly Francis
MOLLY FRANCIS
JUSTICE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	CASE NO. 86-31299
COASTAL PLAINS, INC.	§	

ORDER REGARDING MOTION FOR CLARIFICATION OR RECONSIDERATION

Background

This bankruptcy case was commenced over seventeen years ago upon the filing by Coastal Plains, Inc. of a petition for relief under Chapter 11 of the Bankruptcy Code on April 22, 1986. One week after the filing of the petition, Coastal Plains, Inc., as debtor-in-possession, commenced an adversary proceeding against Browning Manufacturing ("Browning"), its largest unsecured creditor, seeking the return of certain inventory and suing for conversion, interference with contracts, punitive damages and damages arising from the creditor's alleged violation of the automatic stay. Shortly after the adversary proceeding was filed, the debtor-in-possession filed its schedules and failed to list any claim against Browning. Three months later, Coastal's secured lender moved for relief from stay to foreclose on Coastal's assets. A stipulation submitted in support of the lift stay motion by Coastal and its secured lender listed assets of Coastal, including general intangibles of computer software, customer lists, and vendor lists (but no mention of any causes of action) worth an estimated $20,000.00. Browning withdrew its objection to the lifting of the stay, and the motion was granted. The secured lender conducted an auction of the assets and purchased the assets for $3.25 million. The

assets were subsequently purchased by Industrial Clearinghouse, Inc. ("ICHI") in two separate transactions, the second of which occurred in February 1987 and which specifically included the claim against Browning. IHCI pursued the claim against Browning through the federal courts, received a multi-million dollar jury verdict against Browning in the district court, but was ultimately thwarted when the Fifth Circuit ruled that the claims against Browning were barred by judicial estoppel. *See, In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999).

Some time during the course of this lengthy proceeding, the bankruptcy case was converted to one under Chapter 7, and Jeffrey Mims was appointed the Chapter 7 trustee ("Trustee"). After the Fifth Circuit's ruling, the Trustee reviewed the possible malpractice claim against counsel for the debtor-in-possession for failure to schedule the claim against Browning and made an affirmative decision not to pursue the legal malpractice claim. The bankruptcy case was closed on December 12, 2000.

ICHI attempted to pursue the legal malpractice claim in Texas state court. However, the state court, in an order which has become final, ruled that the malpractice claim remained in the closed bankruptcy estate.

ICHI, Unsatisfied, Returns to Bankruptcy Court

On May 30, 2003, Industrial Clearinghouse, Inc. ("ICHI") filed a Motion to Reopen Case and for Determination that Appointment of a Trustee is Necessary for the stated purpose of allowing ICHI to "obtain clarification as to whether malpractice claims against Jackson Walker, L.L.P. ("Jackson Walker") arising out of legal work performed for Coastal Plains, Inc., remains property of the

subject bankruptcy estate" and if so, to allow ICHI to move for abandonment of the malpractice claims. ICHI also sought appointment of a trustee on the grounds a trustee would be necessary in the event the Court determines that an abandonment should be ordered because such an order may only be made to a trustee in a Chapter 7 bankruptcy case. A former attorney for the former Chapter 7 Trustee joined in the request for the appointment of a trustee and objected to the abandonment.

The undersigned did not handle the original bankruptcy case. On June 4, 2003, this Court reopened the case to review the file and to examine the issues raised by Industrial Clearinghouse, Inc. At that time, the Court did not grant ICHI's request for a determination that the appointment of a trustee is necessary. ICHI filed a Renewed Motion for Determination that Appointment of a Trustee is Necessary and a Motion to Abandon seeking the abandonment of "whatever interest, if any, the bankruptcy estate may hold in all claims against Jackson Walker, L.L.P." on July 8, 2003. On August 1, 2003, a hearing was held on the issues of whether the case should remain open and, if so, whether a trustee should be appointed.

On August 14, 2003, the Court entered an Order Denying Motions for Appointment of Trustee and Motion for Abandonment of Claims and Closing Bankruptcy Case (the August 14 Order). On August 22, 2003, ICHI filed a Motion for Clarification or Reconsideration in which it requests this Court to clarify or reconsider its ruling in the August 14 Order. The Court will grant that Motion and will clarify its August 14 Order as follows.

The legal malpractice claim was not abandoned by the Trustee in the bankruptcy case. Thus, the finding of the

state court that the malpractice claim remained in the bankruptcy case, which, at the time of the entry of the August 14 Order was an interlocutory judgment but is now the subject of a final judgment in state court, was correct. Because ICHI has indicated that it is not asking this Court to overturn the state court's order, the *Rooker/Feldman* doctrine is not implicated.[1] The question remains whether this Court should have ordered the appointment of a trustee in the reopened case so that it could then order that trustee to abandon the legal malpractice claim pursuant to § 554. The Court agrees that a reading of its earlier Order could leave the reader unclear of the Court's finding regarding the status of the legal malpractice claim. Therefore, the Court will clarify and further explain that Order.

In its August 14 Order, the Court did not state that the Trustee had abandoned the legal malpractice claim. The Court simply pointed out that the Trustee had made a decision regarding the administration of the claim and that ICHI should not be allowed to come in and have a second Trustee appointed to review the same claim. This finding addressed the Motion before the Court: a motion to reopen the bankruptcy case and to appoint a trustee for ICHI's purposes of attempting to have the legal malpractice claim abandoned, if it had not already been abandoned by the original Trustee. Thus, the entry by the Court of its August 14 Order was based, at least in part, on the Court's finding that it was inappropriate to reopen a bankruptcy

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[1] The *Rooker/Feldman* doctrine states that federal courts "lack jurisdiction to entertain collateral attacks on state judgments." *See, U.S. v. Shepherd*, 23 F.3d 923, 924 (5th Cir. 1994) (citations omitted).

case and appoint another trustee to examine a claim that had already been examined by the original trustee.

Ultimately, however, this Court did not appoint another trustee for a "second bite at the apple" and will not reconsider that ruling because the legal malpractice claim at issue cannot be abandoned, under § 554 of the Bankruptcy Code, either by a trustee or by operation of law. In this case the cause of action against Jackson Walker for legal malpractice that ICHI seeks to have abandoned from the bankruptcy estate would have arisen only in favor of Coastal Plains, Inc., *as debtor-in-possession*, because the alleged malpractice occurred after the bankruptcy petition was filed and during a time when coastal plains was acting as a debtor-in-possession. Upon conversion of the case to one under Chapter 7, the malpractice claim became property of the Chapter 7 estate. Although generally speaking, an asset of a Chapter 7 estate may be abandoned by the trustee pursuant to § 554 of the Bankruptcy Code, the trustee's power to abandon property is not without limits.

Limits on Abandonment

In *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989), the Supreme Court recognized in discussing its holding in *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection* that a trustee did not have the power under § 554(a) of the Bankruptcy Code to abandon property that contained hazardous waste, that "a trustee's authority to dispose of property could be limited in order 'to protect legitimate state or federal interests.'" *Ron Pair*, 489 U.S. at 243-44, 109 S.Ct. at 1031-32 (quoting *Midlantic Nat.*

Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986)). The Supreme Court also noted that it had concluded, in *Midlantic*, "that a contrary result would render abandonment doctrine inconsistent with other provisions of the Code itself, which embody the principle that 'the trustee is not to have *carte blanches* to ignore no bankruptcy law.'" *Id.* at 244, 109 S.Ct. at 1032 (quoting *Midlantic*, 474 U.S. at 502, 106 S.Ct. at 760).

In this case, the asset in question is a legal malpractice claim against the law firm that represented the debtor-in-possession during the tendency of the Chapter 11 case for alleged malpractice that occurred during this period of representation. The Fifth Circuit has recognized that under Texas law, the assignment of a legal malpractice claim is strictly prohibited as being against public policy. *See, Britton v. Seale*, 81 F.3d 602, 604 (5th Cir. 1996) (citing *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 318 (Tex. App. – San Antonio 1994, writ refused). The Fifth Circuit noted that the decision of the *Zuniga* court, which held that "an assignment of a legal malpractice action arising from litigation is invalid," was, under Texas law, "as binding as a decision of the Supreme Court itself" because the Supreme Court had refused the writ. *Britton*, 81 F.3d at 603, n.2 (citing Tex.R.App.P. 133(a) and quoting *'21' Int'l Holdings v. Westinghouse Elec. Corp.* 856 S.W.2d 479, 483 (Tex. App. – San Antonio 1993, no writ) (quoting *Ohler v. Trinity Portland Cement Co.* 181 S.W.2d 120, 123 (Tex.Civ.App. – Galveston 1944, no writ))).

The alleged assignee of the legal malpractice claim in *Britton* argued that *Zuniga* was distinguishable because the legal malpractice claims arose from an attorney's

representation of her mother's estate, not litigation. In response, the Fifth Circuit stated that "[w]hile the court of appeals limited the express holding of *Zuniga* to claims arising from litigation, its reasoning extends well beyond the facts of that case," and that the *Zuniga* court "concluded generally that 'the costs to the legal system of assignment outweigh its benefits.'" *Id.* at 604. The alleged assignee argued further that "Texas courts are concerned only with specific abuses – such as sale to strangers for profit and transfer by defendants in settlement of litigation – and not with assignment in general." *Id.* The Fifth Circuit again rejected this argument, stating that "she is wrong in concluding that they limit the ban on assignment to cases presenting those problems. Instead, *Zuniga* and *Booth* appear to prohibit assignment altogether in order to prevent such problems from occurring." *Id.* (citations omitted). Lastly, the alleged assignee argued that the assignment of the legal malpractice claim was valid because the assignment occurred "by operation of law." *Id.* at 605. Again, the Fifth Circuit rejected her attempt to distinguish *Zuniga* stating,

> Under Texas law, the mere fact that a court has general statutory authority to order the transfer of property does not permit it to order the transfer of a legal malpractice claim. Thus, while a probate court order directing the transfer of such a claim might be said to effect an assignment 'by operation of law,' it would also do so in derogation of law.

Id. The case law that prohibits the transfer of legal malpractice cases sets forth a number of reasons for the policy which include the chilling effect it would have on the attorney-client relationship, *see, Zuniga*, 878 S.W.2d at 317 ("Ultimately, to allow assignment would make lawyers

reluctant – and perhaps unwilling – to represent defendants with inadequate insurance and assets."), and the fear that allowing assignment of such claims would result in the trafficking of legal malpractice claims for profit. *See, City of Garland v. Booth*, 895 S.W.2d 766, 770 (Tex.App. – Dallas 1995, writ denied) ("[T]o allow assignability of such claims would relegate the legal malpractice action to the marketplace and convert it to a commodity to be exploited and transferred to an economic bidder who may have had no professional relationship with the attorney.") (citing *Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83, 87 (1976)).

Because the prohibition against assignment of legal malpractice claims is clearly a strong public policy in the State of Texas, any abandonment of a legal malpractice claim that would effect an illegal assignment under Texas law, would be prohibited under the Bankruptcy Code as well. *See, Ron Pair*, 489 U.S. at 243-44, 109 S.Ct. at 1031-32 ("[A] trustee's authority to dispose of properly could be limited in order 'to protect legitimate state or federal interests.'" (quoting *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494 106 S.Ct. 755, 88 L.Ed.2d 859 (1986)).

In this case, ICHI, a purchaser of estate assets, is seeking to obtain "possession" of a legal malpractice claim for alleged malpractice committed by the attorneys for Coastal Plains, Inc, as debtor-in-possession during the pendency of the Chapter 11 bankruptcy case. Movant claims that it would receive ownership of the abandoned claim via its merger with the post-Chapter 7 debtor entity. Thus, counsel for ICHI may argue that an abandonment under § 554 to the corporate debtor would not be in violation of the public policy against assignment of

legal malpractice claims. However, ICHI would be putting form over substance. In effect, ICHI, not the debtor, would be the holder of the legal malpractice claim. Any abandonment of the legal malpractice claim under § 554 of the Bankruptcy Code, either by a court appointed trustee or by operation of law, that would result in ICHI having the right to bring the legal malpractice action against the former attorneys of Coastal Plains, Inc., would have the effect of an assignment of that legal malpractice action. Such an [sic] result, as discussed above, is contrary to public policy in Texas and therefore would not be permitted under § 554 of the Bankruptcy Code.

For the reasons set forth above, the Court grants ICHI's motion for clarification of this Court's August 14 Order, as indicated herein, and denies ICHI's motion for reconsideration of that Order. The practical result is that the legal malpractice claim against Jackson Walker remains in the bankruptcy estate never to be unleashed. Such is the result demanded by both Texas law and the Bankruptcy Code. Texas has adopted a sound public policy against the trafficking of legal malpractice claims, and this Court's ruling in its August 14 Order followed that policy. Accordingly,

IT IS ORDERED that the Motion for Clarification by Industrial Clearinghouse, Inc. be, and hereby is, **granted**, as set forth herein;

IT IS FURTHER ORDERED that the Motion for Reconsideration by Industrial Clearinghouse, Inc., be, and hereby is, **denied.**

It is so ordered.

Signed this 24 day of November, 2003.

/s/ Harlin D. Dale
HONORABLE
HARLIN D. HALE
UNITED STATES
BANKRUPTCY JUDGE

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
COASTAL PLAINS, INC.	§	**CASE NO. 86-31299 HDH-7**

ORDER DENYING MOTIONS FOR APPOINTMENT OF TRUSTEE AND MOTION FOR ABANDONMENT OF CLAIMS AND CLOSING BANKRUPTCY CASE

On May 30, 2003, Industrial Clearinghouse, Inc. ("ICHI") filed a Motion to Reopen Case and for Determination that Appointment of a Trustee is Necessary for the stated purpose of allowing ICHI to "obtain clarification as to whether malpractice claims against Jackson Walker, L.L.P. ("JacksonWalker") arising out of legal work performed for Coastal Plains, Inc., remains property of the subject bankruptcy estate" and if so, to allow ICHI to move for abandonment of the malpractice claims. ICHI also sought appointment of a trustee on the grounds a trustee would be necessary in the event the Court determines that an abandonment should be ordered because such an order may only be made to a trustee in a Chapter 7 bankruptcy case. A former attorney for the former Chapter 7 Trustee joined in the request for the appointment of a trustee and objected to the abandonment.

On June 4, 2003, this Court reopened the case to review the file and to examine the issues raised by Industrial Clearinghouse, Inc. At that time, the Court did not grant ICHI's request for a determination that the appointment of a trustee is necessary. ICHI filed a Renewed Motion for Determination that Appointment of a Trustee is

Necessary and a Motion to Abandon seeking the abandonment of "whatever interest, if any, the bankruptcy estate may hold in all claims against Jackson Walker, L.L.P." on July 8, 2003. On August 1, 2003, a hearing was held on the issues of whether the case should remain open and, if so, whether a trustee should be appointed. At that hearing, Jackson Walker objected to the reopening of this case on the grounds that there was insufficient grounds to "accord relief" or to constitute "cause" for the reopening of the bankruptcy case. Jackson Walker also argued that there was no need for the appointment of a trustee.

ICHI admits that a state court, in the legal malpractice action filed by it against Jackson Walker in 2001, has entered an interlocutory summary judgment that "any malpractice claims against Jackson Walker in connection with its representation of Coastal Plains remained in Coastal Plains' bankruptcy estate and therefore [can] not be pursued by ICHI." (ICHI Motion, p. 7, ¶ 23). ICHI effectively states that because it would not be "cost-effective" to pursue its alleged rights in the state court system, its only option is to come to this Court for relief.

Because the Court cannot give ICHI the relief it seeks, ICHI's motions seeking appointment of a trustee in this case and order of abandonment will be denied. During the course of the bankruptcy, and after the petition was filed under Chapter 11, Jackson Walker allegedly committed legal malpractice in connection with its representation of Coastal Plains, Inc., as the debtor-in-possession. The case was converted to a case under Chapter 7, and Jeffrey H. Mims was ultimately appointed as the trustee of this bankruptcy estate. In his capacity as trustee, Mr. Mims reviewed the legal malpractice claim and made an affirmative decision not to pursue the claim. (See, Affidavit

of Jeffrey H. Mims, Trustee, Exhibit 21 to Jackson Walker's First Motion for Partial Summary Judgment filed on November 1, 2002, in the state court action, admitted into evidence at the August 1, 2003 hearing before this Court). In the Trustee's Final Report, Application for Compensation, and Report of Proposed Distribution ("Trustee's Report"), filed on March 2, 2000, the Trustee indicated that the "Lawsuit Int." was valued at zero and was fully administered. The Trustee left blank the column that would have indicated an intent to abandon under either § 554(a) or § 554c) of the Bankruptcy Code. Neither Coastal Plains nor ICHI objected to the Trustee's Report. On December 8, 2000, the Trustee's Report of Final Account and Application to Close and Discharge Trustee was filed in which the Trustee certified to the Court that "the estate ha[d] been fully administered" and that "[n]o . . . assets of the estate remain." The Order Discharging Trustee and Closing Case was entered on December 12, 2000. That Order was not appealed.

This is not a situation where a previously undisclosed asset was discovered after the closing of a case. In that case the Court would have the authority under § 350(b) to reopen the case to "administer" that asset. In this case the Trustee was aware of the legal malpractice claim and clearly and unequivocally made an affirmative decision during the pendency of the bankruptcy case regarding the administration of that claim. The case was then closed. "Cause" under § 350(b) does not exist to reopen this case merely because a purchaser of assets that were once estate assets is not happy with the Trustee's decision regarding the administration of one of the estate's alleged assets. The Court will not revisit that issue and appoint another trustee to provide a "second bite at the apple."

There being no "cause" for the reopening of this case, the Court finds that its order reopening the case was improvidently granted. The Court will deny ICHI's motion to appoint a trustee and its motion to order abandonment of the legal malpractice claim and will enter an order closing the case. Accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED that the Motion for Determination that Appointment of a Trustee is Necessary filed by Industrial Clearinghouse, Inc. on May 30, 2003, and the Renewed Motion for Determination that Appointment of a Trustee is Necessary filed by Industrial Clearinghouse, Inc. on July 8, 2003, be, and hereby are, **denied;**

IT IS FURTHER ORDERED that the Motion to Abandon, filed herein by Industrial Clearinghouse, Inc. on July 8, 2003, be, and hereby is, **denied;**

IT IS FURTHER ORDERED that the hearing scheduled for August 14, 2003, be, and hereby is, **cancelled as moot;**

IT IS FURTHER ORDERED that this bankruptcy case, be and hereby is, **closed**.

It is so ordered.

Signed this 12 day of August, 2003.

/s/ **Harlin D. Hale**
Honorable Harlin D. Hale
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

IN RE:	)	
	)	Case No. 386-31299-RCM-7
COASTAL PLAINS, INC.	)	(Chapter 7)

ORDER REOPENING ESTATE

Upon consideration of the motion of Industrial Clearinghouse, Inc. ("ICHI"), a party in interest, to reopen this estate and this case, and good cause having been shown therefor, it is

ORDERED that this estate and this case be, and the same hereby is, reopened pursuant to 11 U.S.C. § 350(b) and Rule 5010, F. R.Bankr.P., so ICHI can obtain clarification whether any malpractice claims the bankruptcy estate might have ever held against Jackson Walker, L.L.P. ("Jackson Walker") remain as property of the bankruptcy estate and, if so, to: a) seek abandonment of those claims; and b) obtain a determination, if necessary or appropriate, whether any malpractice claims against Jackson Walker that the Coastal Plains' estate may have ever included remain viable. ~~And, it appearing that a trustee is necessary, it is further~~

~~ORDERED that the United States trustee appoint a disinterested person to serve as trustee in the case.~~

Dated: 6/3/03

BY THE COURT

/s/ Harlin D. Hale
United States Bankruptcy Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-10861

In The Matter Of: COASTAL PLAINS INC
Debtor

- -

INDUSTRIAL CLEARINGHOUSE INC
Appellant-Cross-Appellee

v.

JACKSON WALKER
Appellee-Cross-Appellant

.....

Appeals from the United States District Court
for the Northern District of Texas, Dallas

.....

ON PETITION FOR REHEARING EN BANC

(Filed Jul. 19, 2006)

(Opinion 6/12/06, 5 Cir., ___, ___ F.3d ___)

Before GARWOOD, DAVIS, and GARZA, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that

the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

LOCAL BANKRUPTCY RULES
For The
UNITED STATES BANKRUPTCY COURT
For The
NORTHERN DISTRICT OF TEXAS

Effective February 9, 1987

Rule 1009. Amendments of Voluntary Petitions, Lists, Schedules and Statements of Affairs

(a) Number of copies. An amendment of a voluntary petition, list, schedule, statement of financial affairs, statement of executory contracts, or Chapter 18 Statement shall be filed in the same number as required for the petition as provided in Local Rule 1002(c).

(b) Matrix. Whenever additional creditors are scheduled by amendment, a supplemental matrix listing of such additional creditors and their addresses shall be filed. Such supplemental matrix shall bear the name of the case and case number and show the date of the amendment. The supplemental matrix shall be filed with the amendment.

(c) Where creditors are added by amendment to the schedules after the original Notice of 341 Meeting has been sent out by the Bankruptcy Clerk or the Chapter 13 Trustee, the Debtor's attorney (or Debtor, if pro se) is responsible for giving Notice to each such creditor of the filing of the bankruptcy and all applicable bar dates and deadlines if these bar dates and deadlines have been set at the time of the amendment.

(d) The Statement of Intention may be amended by the debtor at any time before the expiration of the period provided in § 521(2)(B) of the Bankruptcy Code. The

debtor shall give notice of the amendment to the Chapter 7 or Chapter 18 trustee and to any entity affected thereby.

Rule 1015. Joint Administration of Cases Pending in Same Division

(a) Motions for joint administration of cases involving two or more related debtors will be assigned for determination to the bankruptcy judge presiding over the case with the lowest filing number.

(b) An order directing joint administration of individual cases of a husband and wife shall, if one spouse has elected the exemptions under § 522(b)(1) of the Bankruptcy Code and the other has elected the exemptions under § 522(b)(2), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the debtors that unless they elect the same exemptions within fifteen (15) days, they will be deemed to have elected the exemptions provided by § 522(b)(1).

(c) The filing of a joint petition shall be deemed an order directing joint administration for the purpose of subsection (b) of this Rule, unless the Court orders otherwise.

Rule 1017. Dismissal for "Substantial Abuse"

An individual debtor's case under Chapter 7 may be dismissed for substantial abuse only after a hearing on notice to the debtor and the trustee and such other parties in interest as the court directs. The notice shall advise the

debtor of the matters which the court will consider at the hearing.

Rule 1019. Conversion of Chapter 11 Reorganization Case or Chapter 13 Debt Adjustment Case to Chapter 7 Liquidation Case

(a) The Statement of Intention, if required, shall be filed within 30 days following entry of the order of conversion or before the first date set for the meeting of creditors, whichever is earlier. An extension of time may be granted for cause only on motion made before the time has expired. Notice of an extension shall be given to any committee, trustee, or other party as the court may direct.

(b) Within fifteen (15) days after the entry of the Order of Conversion, the debtor shall file a schedule of those assets remaining in the possession of the debtor as of the date of conversion, and a list of abandoned property and property against which the automatic stay of lien enforcement terminated during the Chapter 11 case, and a schedule of unpaid post-petition obligations or expenses, if any. With respect to said post-petition obligations or expenses, the debtor shall prepare and file a supplemental mailing matrix as required by Local Rule 1002(b).

Rule 2002. Notice to Creditors, Equity Security Holders and United States

(a) Twenty-day Notices to Parties in Interest:

(1) Notice of the meeting of creditors pursuant to § 341 of the Code shall be prepared by

the Clerk. The notice shall be given by the Clerk in all cases under Chapter 7, by the debtor-in-possession or the trustee in all cases under Chapter 11, and by the Standing Trustee in all cases under Chapter 13.

(2) Notice of a proposed use, sale, or lease of property other than in the ordinary course of business shall be prepared by the proponent of such use, sale or lease and shall be given by the proponent, except in a case under Chapter 7, in which event the Clerk shall give the notice.

(3) Notice of the hearing on approval of a compromise or settlement of a controversy shall be given by the Clerk in all cases, except in a Chapter 11 case, in which event the notice shall be given by the debtor-in-possession or the trustee.

(4) Notice of the date fixed for the filing of claims against a surplus in an estate as provided in Bankruptcy Rule 3002(c)(6) shall be given by the Clerk.

(5) In a Chapter 7 liquidation, notice of the hearing on the dismissal or conversion of a case to another chapter shall be given by the Clerk. In a Chapter 11 reorganization, notice of the hearing on the dismissal or conversion of a case to another chapter shall be given by the movant. When the U.S. Trustee is the movant, notice of the hearing on the dismissal or conversion of a Chapter 11 case shall be given by the Clerk of the Bankruptcy Court.

(6) Notice of the time fixed to accept or reject a proposed modification of a plan shall be prepared and served by the proponent of the modification.

(7) Notice of hearings on all applications for compensation or reimbursement of expenses totaling in excess of $100 shall be prepared and served by the applicant.

(8) Notice of the time fixed or "bar date" for filing proofs of claims in Chapter 11 cases pursuant to Bankruptcy Rule 3008(c)(3), shall be given by the trustee or debtor-in-possession.

(9) Notice of the time fixed for filing proofs of claim in Chapter 7 or Chapter 13 cases pursuant to Bankruptcy Rule 3002(c), shall be given by the Clerk in Chapter 7 cases, and by the Standing Trustee in Chapter 13 cases, and combined with the notices given in the "Order for Meeting of Creditors and Fixing Times for Filing Objections to Discharge and Complaints to Determine Dischargeability of Certain Debts, Combined with Notice Thereof and of Automatic Stay."

(b) Twenty-five Day Notices to Parties in Interest.

The notices required by Bankruptcy Rule 2002(b) shall be given by the party whose disclosure statement is being considered or by the proponent of the plan, as the case may be.

(c) Notice to Equity Security Holders.

Notice of the Order for Relief and of any meeting of equity security holders ordered by the Court pursuant to § 341 of the Code shall be given by the debtor-in-possession or trustee in all cases under Chapter 11. The notices required by subdivisions (d)(3), (4), (5) and (6) of

the Bankruptcy Rule 2002 shall be given in accordance with subdivisions (a)(5) and (6) and (b) of this Rule.

(d) Other Notices.

(1) The notices required by subdivisions (f)(1), (3), (4), (5), (6) of Bankruptcy Rule 2002 shall be given by the party responsible for serving notice of the § 341 meeting of creditors as provided in subdivision (a)(1) of this Rule.

(2) Notice of the dismissal of a case under Chapter 7 or 11 shall be given by the Clerk, provided that the debtor-in-possession shall give such notice if the order was entered on motion of the debtor-in-possession. Notice of the dismissal of a Chapter 13 case shall be given by the Standing Trustee.

(3) The notices required by subdivisions (f)(7), (8) and (10) of Bankruptcy Rule 2002 shall be given by the Clerk of the Bankruptcy Court.

(4) The notice required by subdivision (f)(9) of Bankruptcy Rule 2002 shall be given by the proponent of the plan.

(e) Debtor to Provide Notice.

Whenever notice is required to be given under this Rule by the Clerk or a party other than the debtor-in-possession, such debtor-in-possession shall provide the notice if the mailing matrix, required by Local Rule 1002(b), has not been filed.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	CASE NO.
COASTAL PLAINS, INC.,	§	386-31299-RCM-11
	§	
Debtor.	§	Chapter 7

SUPPLEMENT TO SCHEDULE B-2
OTHER UNLIQUIDATED CLAIMS

Debtor, Coastal Plains, Inc., by and through its representative and former chief executive officer R. Wayne Duke, hereby files this its Supplement to Schedule B-2.

Type of Property	**Description**	**Current Market Value of Debtor's Interest in Property, Without Deducting Any Secured Claim or Exemption**
Unliquidated Cause of Action	Claim for damages based upon professional malpractice against Jackson Walker, LLP	Value of claim unknown. Damages in the approximate amount of $10,000,000.00 requested
Unliquidated Cause of Action	Claim for damages based upon tortious interference	Value unknown. Damages in the amount op $10,000,000.00 requested

	with contract and negligent misrepresentation against Canterbury, Stuber, Elder & Gooch; James R. Callahan; Charles W. Stuber; and Robert J. Shapiro	

UNSWORN DECLARATION UNDER PENALTY OF PERJURY OF INDIVIDUAL TO SCHEDULES A AND B

I, R. Wayne Duke, on behalf of the Debtor, Coastal Plains, Inc. hereby certify under penalty of perjury that I have read the foregoing Supplement to Schedule B-2 and that it is true and correct to the best of my knowledge, information and belief.

Dated this 9th day of June 2000

/s/ R. Wayne Duke
R. Wayne Duke

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the true and correct copies of the foregoing Supplement to Schedule B-2 Other Unliquidated Claims were duly served upon:

Office of the U.S. Trustee
1100 Commerce Street,
Room 9C60
Dallas, Texas 75242-1496

JACKSON WALKER LLP
901 Main Street, Suite 6000
Dallas, Texas 75202

M. Bruce Peale, Esq.
1504 Westlake Drive
Plano, Texas 75075
Ronald W. Johnson, Esq.
Barton L. Ridley, Esq.
TOUCHSTONE,
BERNAYS, JOHNSTON,
BEALL & SMITH
4700 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270-2177

by deposing same in the United States Mail, first-class postage affixed thereon, this 9th day of June, 2000.

/s/ D. Patrick Long

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS

IN RE:	)(	**CASE NO.**
	)(	
Coastal Plains, Inc.	)(	**386-31299-RCM-7**
	)(	
DEBTOR(S)	)(	

TRUSTEE'S REPORT OF FINAL ACCOUNT AND APPLICATION TO CLOSE CASE AND DISCHARGE TRUSTEE

(Filed Dec. 8, 2000)

JEFFREY H. MIMS, trustee of the estate of the above-named Debtor(s), certifies to the Court and the United States Trustee, that the estate has been fully administered. A Trustee's Final Report has been filed and proper disbursements completed. No funds or assets of the estate remain.

Therefore, pursuant to FRBP 5009, the trustee requests that this final account be accepted, and that the Court order the case closed and discharge the Trustee of any further duties.

DATED: 11/14/00

Jeffrey H. Mims
TRUSTEE

****

REVIEWED BY THE UNITED STATES TRUSTEE

I have reviewed the Trustee's Final Account and Application to Close Case and Discharge Trustee.

UNITED STATES TRUSTEE

DATE: 12-4-00 BY: [Illegible]

Jeffrey H. Mims, Trustee
3102 Oak Lawn Avenue
Suite 700, The Centrum
Dallas, Texas 75219
(214) 210-2913

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT
OF TEXAS, DALLAS DIVISION**

IN RE:	)(	
	)(	
Coastal Plains, Inc.	)(	**Case No. 386-31299-RCM-7**
	)(	
Debtor(s)	)(	

**ORDER DISCHARGING TRUSTEE
AND CLOSING CASE**

(Filed Dec. 12, 2000)

It appearing to the Court that Jeffrey H. Mims, the Trustee in the above stated case, filed a Final Report; that the said Trustee has made distribution in accordance with the Trustee's Report and Final Distribution and has rendered an account thereof to the U. S. Trustee and the Clerk of the Bankruptcy Court;

IT IS ORDERED that the Trustee be and is hereby discharged and relieved of his trust, and that the said estate be and it hereby is closed.

Dated this the ___ day of ___, 2000.

FOR THE COURT
TAWANA C. MARSHALL, CLERK

BY: [Illegible]
Deputy Clerk

Jody Sheets
State Bar No. 18180500
SHEETS & HOLCOMB
700 North Pearl
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ATTORNEYS FOR THE MOVANT,
INDUSTRIAL CLEARINGHOUSE, INC.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

IN RE:	)	Case No. 386-31299-RCM-7
	)	(Chapter 7)
COASTAL PLAINS, INC.	)	

RENEWED MOTION FOR DETERMINATION THAT APPOINTMENT OF A TRUSTEE IS NECESSARY, COMBINED WITH SUPPORTING BRIEF

(Filed Jul. 8, 2003)

Industrial Clearinghouse, Inc. ("ICHI"), a party in interest, renews its motion requesting the Court to determine that a trustee is necessary to insure the efficient

administration of this case. In support hereof, ICHI shows the following:

1. On December 12, 2000, this case was closed and Jeffrey H. Mims, the trustee serving in the case at the time was discharged.

2. ICHI is the surviving corporation in a merger with the above-named debtor, Coastal Plains, Inc. ("Coastal Plains").

3. In 2001, ICHI sued Jackson Walker in the District Court of Dallas County, Texas, 116th Judicial District, Cause Number 01-03461-F, for professional malpractice, both in representing ICHI prior to its merger with Coastal Plains and in representing Coastal Plains (the "Malpractice Action"). Jackson Walker has defended the Malpractice Action by contending, among other things, that any malpractice claims against Jackson Walker for its representation of Coastal Plains remain in Coastal Plains' bankruptcy estate and, therefore, could not be prosecuted by ICHI. ICHI disagreed with Jackson Walker's contention. Nonetheless, the trial judge in the Malpractice Action recently ruled that any malpractice claims against Jackson Walker in connection with its representation of Coastal Plains remained in Coastal Plains' bankruptcy estate and therefore could not be pursued by ICHI. Presently, there is an interlocutory summary judgment in the Malpractice Action that prevents the prosecution of any malpractice claims arising out of legal work Jackson Walker performed for Coastal Plains.

4. In response to the trial judge's ruling in the Malpractice Action, ICHI filed a motion to reopen this case for the purpose of seeking, among other things, abandonment of any claims against Jackson Walker.

5. This Court recently granted ICHI's motion to reopen, but did not determine that a trustee was necessary to protect the interests of the debtor or to insure the efficient administration of the case and, consequently, did not direct appointment of a trustee.

6. ICHI has determined that the most expeditious and cost-effective way to resolve the issues raised by Jackson Walker and the trial court in the Malpractice Action is to file a motion seeking abandonment under 11 U.S.C. § 554(b) of any claims against Jackson Walker that might be in the Coastal Plains bankruptcy estate.

7. As the Court is aware, under 11 U.S.C. § 554(b), "[o]n request of a party in interest and after notice and a hearing, **the court may order the trustee** to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." Emphasis supplied. Thus, it appears questionable that, without a trustee in place, there is anyone for this Court to order to abandon the claims against Jackson Walker, regardless that ICHI's motion for abandonment is well taken, or to grant any other relief to which ICHI may be entitled. ICHI submits that the Court should determine that a trustee is necessary to protect the interests of the debtor or to insure the efficient administration of the case and direct the United States trustee to appoint a disinterested person to serve as trustee in the case.

WHEREFORE, Industrial Clearinghouse, Inc. renews its requests that the Court determine that a trustee is necessary to protect the interests of the debtor or to insure the efficient administration of the case and direct the United States trustee to appoint a disinterested person to serve as trustee in the case. Industrial Clearinghouse, Inc.

further prays for such other and further relief as is just and proper.

Respectfully submitted,

Jody Sheets
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and

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By: Jody Sheets

ATTORNEYS FOR THE
MOVANT, INDUSTRIAL
CLEARINGHOUSE, INC.

CERTIFICATE OF MAILING

The undersigned certifies that on July 8, 2003,, a true and correct copy of the above and foregoing was faxed, hand delivered, and/or mailed, postage prepaid, by first class mail, to:

Luke Madole, counsel for Jackson Walker
Carrington, Coleman, Sloman & Blumenthal, L.L.P.

200 Crescent Court, Suite 1500
Dallas, Texas 75201

William T. Neary
United States Trustee
976 Earl Cabell Federal Building
1100 Commerce Street
Dallas TX 75242

Jeffrey H. Mims, Trustee
The Centrum, Suite 700
3102 Oak Lawn Avenue
Dallas TX 75219

Bruce Peele
1504 Westlake Drive, Suite 101
Plano TX 75075

/s/ Jody Sheets
Jody Sheets

Jody Sheets
State Bar No. 18180500
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ATTORNEYS FOR THE MOVANT,
INDUSTRIAL CLEARINGHOUSE, INC.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

IN RE: -	)	Case No. 386-31299-RCM-7
	)	(Chapter 7)
COASTAL PLAINS, INC.	)	

MOTION FOR ABANDONMENT, COMBINED WITH SUPPORTING BRIEF

(Filed Jul. 8, 2003)

Industrial Clearinghouse, Inc. ("ICHI"), surviving corporation in the merger of ICHI and the above-named debtor, Coastal Plains, Inc., moves the Court pursuant to 11 U.S.C. § 554(b) and Rule 6007, F.R.Bankr.P., to abandon

whatever interest, if any, the bankruptcy estate may hold in all claims against Jackson Walker, L.L.P. ("Jackson Walker"). ICHI respectfully represents as follows in support of this motion:

1. The above-styled case was commenced as a Chapter 11 case in April of 1986. Jackson Walker was employed with this Court's approval as legal counsel for the debtor in possession and served in that capacity throughout the time it was a Chapter 11 case.

2. Coastal Plains' principal secured lender was Westinghouse Credit Corporation ("Westinghouse"). Coastal Plains owed in excess of $8.5 million to Westinghouse and approximately $8 million to other creditors. Leaving aside setoff and other issues, Browning Manufacturing, formerly a division of Emerson Electric Company ("Browning"), was Coastal Plains' largest unsecured creditor.

3. A week after this bankruptcy case was commenced, Jackson Walker prepared and filed an adversary proceeding on behalf of Coastal Plains against Browning in which Coastal Plains sought an order both enjoining Browning from disposing of certain inventory Coastal Plains had returned to Browning pursuant to a prepetition agreement and directing Browning to turn over that inventory to Coastal Plains (the "Browning Adversary"). Coastal Plains also alleged claims in the Browning Adversary for conversion; interference with contracts and/or business relationships because of Browning's failure to return inventory; punitive damages; and violation of the automatic stay.

4. Shortly after the Browning Adversary was filed, this Court found that Browning had violated the automatic stay and ordered Browning to return Coastal Plains' inventory to it; the other claims made in the Browning Adversary were not addressed at that time. Not all of the inventory was returned, and some of the returned inventory was in a damaged condition.

5. In June of 1986, with Jackson Walker's legal assistance, Coastal Plains filed its bankruptcy schedules and statement of financial affairs. Despite having already prepared and filed the Browning Adversary on behalf of Coastal Plains, Jackson Walker did not list any claims against Browning in Coastal Plains' bankruptcy schedules or statement of financial affairs.

6. In September of 1986, Westinghouse moved for relief from the automatic stay so that it could foreclose on Coastal Plains' assets. Westinghouse asserted that it was owed in excess of $8 million by Coastal; that its debt was nearly equal to the value of its collateral; and that reorganization of Coastal Plains was not possible. Westinghouse ultimately submitted a stipulation (the "Stipulation") in support of its motion to modify the stay that included estimates of the value of Coastal Plains' assets, including that its general intangible assets consisted of computer software programs, customer lists, and vendor lists, with a total worth less than $20,000. The Stipulation did not make mention of any claims against Browning. The Stipulation showed more than a $5 million shortfall between the value of Coastal Plains' assets and its debt to Westinghouse. Although the Stipulation was initially prepared by Westinghouse, Jackson Walker was actively involved as legal counsel to Coastal Plains in finalization

of the Stipulation. Jackson Walker signed the Stipulation on behalf of Coastal Plains.

7. The day after the Stipulation was filed, Westinghouse's motion to lift the stay was granted and Westinghouse foreclosed on Coastal Plains' assets through an auction conducted in October of 1986. Westinghouse was the successful bidder at the auction and purchased all assets sold for $3.25 million.

8. In February of 1987, ICHI purchased for $1.24 million certain of the assets Westinghouse acquired from Coastal Plains through the auction. The assets ICHI purchased expressly included potential cause of action against Browning.

9. In April of 1987, this case was converted to a Chapter 7 case.

10. Upon conversion of this case to Chapter 7, Duke Salisbury was appointed as trustee, qualified, and served in that capacity until his resignation.

11. In October of 1988, ICHI was substituted for Coastal Plains as the plaintiff in the Browning Adversary. ICHI filed its first amended complaint in the Browning Adversary in March of 1989, alleging that Browning's breach of the pre-petition inventory return agreement and delay in returning Coastal Plains' inventory caused Coastal Plains' bankruptcy and demise; and asserting claims for breach of contract, conversion, interference with contracts and/or business relationships, fraud, and violation of the automatic stay. A second amended complaint was filed in the Browning Adversary in late 1989; a third, in early 1992.

12. Upon Duke Salisbury's resignation as trustee in this case, Jeffrey H. Mims (the "Trustee") was appointed as trustee, qualified, and served in that capacity until this case closed.

13. The Browning Adversary was set for trial in May 1993 in the United States District Court for the Northern District of Texas, Dallas Division (the "Federal District Court"), which had withdrawn the reference from this Court. But, on the eve of trial, the Trustee moved to intervene, claiming that Coastal Plains' bankruptcy estate owned the claims being pursued against Browning. The Federal District Court referred the case to this Court for a determination who owned the claims being asserted in the Browning Adversary.

14. Following a July 1993 hearing, this Court ruled that the Coastal Plains bankruptcy estate owned the tort claims asserted against Browning and that ICHI owned the contract claims. Ultimately, ICHI and the Trustee agreed to share any recovery against Browning, with ICHI to receive 85 percent. This Court approved the recovery sharing agreement between ICHI and the Trustee and, *inter alia,* rejected Browning's judicial estoppel argument. Browning appealed to the Federal District Court, which affirmed; and to the 5th Circuit, which affirmed approval of the sharing agreement, but dismissed Browning's appeal as to judicial estoppel, holding that the ruling was interlocutory.

15. The Browning Adversary was tried in the District Court in early 1996 and the jury awarded ICHI and the Trustee $5 million for breach of contract, $2.5 million for conversion, $1.75 million for breach of fiduciary duty, $1.3 million for tortious interference, and $7.5 million in

punitive damages. However, the Federal District Court ordered ICHI and the Trustee to elect a recovery between the tort and contract awards; reduced the punitive damages to $4 million; and granted Browning a $1.4 million setoff.

16. ICHI and the Trustee elected, under protest, to recover for breach of contract, which resulted in a final judgment awarding damages of $3.6 million ($5 million for contract breach less $1.4 million setoff), and $1.6 million for attorney's fees and costs. As stated above, this Court had previously determined that the breach of contract claims upon which ICHI and the Trustee prevailed were owned by ICHI.

17. Browning appealed the judgment in the Browning Adversary and the 5th Circuit reversed and rendered judgment against ICHI and the Trustee, holding that all claims against Browning in the Browning Adversary, except for tortious interference claim, were judicially estopped because they had not been properly disclosed in Coastal Plains' bankruptcy schedules, statement of financial affairs, and the Stipulation. See *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999). The Court found the tortious interference claim barred by limitations.

18. In June of 2000, a supplement to Schedule B-2 was filed on behalf of Coastal Plains that listed, *inter alia*, an unliquidated cause of action for professional malpractice against Jackson Walker. The cause of action against Jackson Walker was listed with an unknown value, but the estimated damages were listed to be in the approximate amount of $10,000,000. The Trustee was served with this supplemental schedule, and was thus expressly put on notice of the malpractice claim.

19. In addition, a principal of ICHI and one of ICHI's lawyers met with the Trustee after the 5th Circuit reversal to expressly discuss pursuing a malpractice action against Jackson Walker for its role in the Browning Adversary being reversed and rendered against ICHI and the Trustee. The Trustee advised that he would think about it – then abruptly without taking any action or in any way administering this claim, he closed the bankruptcy estate.

20. On December 12, 2000, this case was closed and the Trustee was discharged. This closure of the case should have triggered an abandonment of any scheduled property that was not administered by the Trustee. See Sec. 554 (c) of the Bankruptcy Code and *Starrett v. Starrett* 541 A.2d 1119 (N.J. 1988)[1]

21. In 2001, ICHI sued Jackson Walker in the District Court of Dallas County, Texas, 116th Judicial District, Cause Number 01-03461-F, for professional malpractice, both in representing ICHI prior to its merger with Coastal Plains and in representing Coastal Plains (the "Malpractice Action"). Jackson Walker defended the Malpractice Action by contending, among other things, that any claims against Jackson Walker for its representation of Coastal Plains remained in the Coastal Plains' bankruptcy estate and, therefore, could not be prosecuted by ICHI. ICHI contested this position in the context of a Motion for Summary Judgment filed by Jackson Walker. The trial judge in the Malpractice Action recently entered

[1] The plain meaning of the language 'not administered at the time of the closing of a case [in Section 554 (c)] indicates that the asset must not be actively administered at the time the case is closed.' Id. at p. 422. "Administer" has been defined as the liquidation or utilization of an asset. Id at p. 1121, Footnote 1.

an interlocutory order and held that any claims against Jackson Walker in connection with its representation of Coastal Plains remained trapped in the closed Coastal Plains' bankruptcy estate and could not be pursued by ICHI. This is a particularly anomalous result given that this Court previously determined that ICHI owned the breach of contract claims upon which ICHI prevailed in the Browning Adversary and it was Jackson Walkers' alleged malpractice that rendered those multi-million dollar claims worthless. Nevertheless, the trial judge's interlocutory ruling in the Malpractice Action effectively means Jackson Walker may not be held accountable for errors and omissions in connection with its representation of Coastal Plains, until and unless:

a) the trial judge's ruling in the Malpractice Action is reversed on appeal, which would not be a particularly cost-effective approach for the litigants in the Malpractice Action and would involve asking a state appellate court to make a determination outside its area of expertise and particularly within this Court's area of expertise; or

b) this Court orders the abandonment of all claims against Jackson Walker that might be property of the estate.

22. Although ICHI believes that the trial judge in the Malpractice Action is incorrect and that the scheduled claims against Jackson Walker are not still trapped in this bankruptcy estate, ICHI submits that if any claims against Jackson Walker are in the bankruptcy estate, they should be abandoned pursuant to 11 U.S.C. § 554(b). Under 11 U.S.C. § 554(b), "[o]n request of a party in interest and after notice and a hearing, the court may

order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."

23. ICHI is a party in interest in this case and requests abandonment of any and all claims against Jackson Walker that may be in the estate. Given the Trustee's conscious decision not to pursue any claims against Jackson Walker that the estate might hold, ICHI submits that any such claims are inherently of inconsequential value and benefit to the estate or unreasonably burdensome and expensive and should be abandoned so that they may be pursued appropriately. This is a particularly appropriate result since the Trustee has provided affidavit testimony to Jackson Walker which has inferred that the Trustee has concluded that the malpractice claims do not merit prosecution. It is finally noted that the estate has no other assets or resources which may be utilized to pursue the action against Jackson Walker, and any economic recovery may in any event be for the account of ICHI since this Court has finally determined that the contract claims. which were the basis of the judgment against Browning were owned by ICHI.

WHEREFORE, Industrial Clearinghouse, Inc. prays that whatever interest, if any, the bankruptcy estate may hold in all claims against Jackson Walker, L.L.P. be abandoned pursuant to 11 U.S.C. § 554(b) and Rule 6007, F.R.Bankr.P., and for such other and further relief as is just and proper.

Respectfully submitted,

/s/ Jody Sheets
Jody Sheets
State Bar No. 18180500

SHEETS & HOLCOMB
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and

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FAX: (972) 490-2351

ATTORNEYS FOR THE MOVANT, INDUSTRIAL CLEARINGHOUSE, INC.

FIAT

It is ordered that the above motion is set for hearing on the ___ day of ___, 2003, beginning at _____ ___M in the _____ courtroom.

_____

CERTIFICATE OF MAILING

The undersigned certifies that on July 8, 2003, a true and correct copy of the above and foregoing Motion for Abandonment, Combined with Supporting Brief was faxed, hand delivered, and/or mailed, postage prepaid, by first class mail, to:

Luke Madole, counsel for Jackson & Walker
Carrington, Coleman, Sloman & Blumenthal, L.L.P.
200 Crescent Court, Suite 1500
Dallas, Texas 75201

William T. Neary
United States Trustee
976 Earl Cabell Federal Building
1100 Commerce Street
Dallas TX 75242

Jeffrey H. Mims, Trustee
The Centrum, Suite 700
3102 Oak Lawn Avenue
Dallas TX 75219
Bruce Peele
1504 Westlake Drive, Suite 101
Plano TX 75075

/s/ Jody Sheets
Jody Sheets

M. Bruce Peele
TBN 15721500
1504 Westlake Drive
Suite 101
Plano, TX. 75075
(972) 516-9884
(972) 509-5625 (fax)
Former Attorney for Trustee

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
COASTAL PLAINS, INC.	§	CASE NO. 386-31299-HDH-7
	§	

MOTION IN SUPPORT OF RENEWED MOTION FOR APPOINTMENT OF TRUSTEE

(Filed Jul. 11, 2003)

COMES NOW the M. Bruce Peele ("**Peele**"), and files this his Motion in Support of the Renewed Motion for Appointment of a Trustee (the "**Motion**") filed Industrial Clearinghouse, Inc. ("**ICHI**"). In support of the Motion, Peele would show the Court the following:

1. Peele is former counsel to the Trustee in the above-captioned case. As such, Peele is the owner of an unsatisfied Chapter 7 administrative claim against the bankruptcy estate.

2. In 1987, the case was converted from a Chapter 11 proceeding to one under Chapter 7 and Duke Salisbury was appointed as the Chapter 7 trustee.

3. Subsequently, Mr. Salisbury relocated to California and resigned as trustee. The Office of US Trustee appointed Jeffrey H. Mims as the successor Chapter 7 trustee. Mr. Mims was the duly authorized and acting trustee in this case until it was closed in 2000 and Mr. Mims was discharged.

4. Upon information and belief, in June of 2000 a supplemental Schedule B-2 was filed on behalf of the Debtor that listed as property of the estate a malpractice cause of action against Debtor's counsel Jackson Walker (the "**Malpractice Claim**"). (See Motion at para. 18).

5. The Motion fails to list who filed the supplemental Schedule B-2 or their authority to file the supplement. In any event, the state district court judge has ruled that the bankruptcy estate is the owner of the Malpractice Claim. (See Motion at para. 21).

6. The law of the case is that the bankruptcy estate is the owner of the Malpractice Claim unless and until that decision is overruled on appeal. That being so, ICHI has filed its Motion seeking to have this Court (1) order the appointment of a trustee; and (2) order the trustee to abandon the Malpractice Claim pursuant to Section 554(b) of the Bankruptcy Code (11 U.S.C.).

Argument

A Trustee Should be Appointed To Administer the Malpractice Claim

7. Contemporanously [sic] herewith Peele has file his opposition to ICHI's motion to abandon property of the estate because Peele believes that the Malpractice Claim has value.

8. Because no trustee is currently charged with the administration of the Malpractice Claim, the appointment of a trustee is necessary to administer this valuable asset.

WHEREFORE, PREMISES CONSIDERED, Trustee requests that this Court (1) grant Movant's Renewed Motion for Appointment of a Trustee, and (2) grant such other relief as is just and equitable under the circumstances.

Respectfully Submitted,

/s/ M. Bruce Peele

M. Bruce Peele
TBN 15721500
1504 Westlake Drive
Suite 101
Plano, Texas 75075
(972) 516-9884
(972) 509-5625 (fax)
Pro Se and as Former Attorney
for the Trustee

CERTIFICATE OF SERVICE

I hereby certify that service of the forgoing Motion was this 10th day of July 2003 made by facsimile or first class mail, postage prepaid to:

Jody Sheets
Sheets & Holcomb
700 North Pearl
Ste. 520
Dallas, TX 75201

Luke Madole
Carrington, Coleman, Sloman & Blumenthal, LLP
200 Crescent Ct, Ste. 1500
Dallas, TX 75201

William T. Neary
U.S. Trustee
976 Earl Cabell Federal Bld
1100 Commerce St.
Dallas, TX 75219

Jeffrey H. Mims
The Centrum, Ste. 700
3102 Oak Lawn Ave.
Dallas, TX 75219

/s/ M. Bruce Peele
M. Bruce Peele

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
COASTAL PLAINS, INC.	§	**CASE NO. 386-31299-HDH-7**
	§	

AFFIDAVIT OF BRUCE PEELE

STATE OF TEXAS	§	
	§	
COUNTY OF DALLAS	§	

BEFORE ME, the undersigned authority, on this day personally appeared Bruce Peele, who, being duly sworn, deposed as follows:

"My name is Bruce Peele, I am of sound mind, capable of making this Affidavit, and personally acquainted with the facts herein stated, and such facts are based upon my personal knowledge:

"I was attorney for ~~Jeffrey H. Mims, Trustee of~~ the [bankruptcy /s/ MBP] Estate of Coastal Plains, Inc., at the time that Wayne Duke and Jody Sheets requested that the Trustee join in the malpractice case against Jackson Walker, LLP which became Cause No. 01-03461-F in the 116th District Court of Dallas County, Texas, styled Industrial Clearinghouse, Inc., Plaintiff v. Jackson Walker, LLP, Defendant.

"I was never consulted by ~~Mr.~~ [Trustee /s/ MBP] Mims regarding the merits or value of the claims of malpractice against Jackson Walker, LLP which have been asserted in the case referenced in the paragraph above."

Further, Affiant sayeth not.

/s/ M. Bruce Peele
Bruce Peele

SUBSCRIBED AND SWORN TO BEFORE ME on this, the ___ day of _____, 2000.

_____
Notary Public in and
or the State of Texas

CAUSE NO. 01-03461-F

INDUSTRIAL CLEARING-HOUSE, INC.,	§	IN THE DISTRICT COURT
Plaintiff,	§	
vs.	§	DALLAS COUNTY, TEXAS
JACKSON WALKER L.L.P.,	§	
Defendant.	§	116TH JUDICIAL DISTRICT

AFFIDAVIT OF JEFFREY H. MIMS, TRUSTEE

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, personally appeared the undersigned Affiant who, being first by me duly sworn, stated on oath as follows:

My name is Jeffrey H. Mims. I am over the age of twenty-one and am competent to testify. I have personal knowledge of the facts hereinafter set out and they are true and correct. I am a panel Trustee in the Northern District of Texas. I have served in that capacity since 1989. During 1995, I was appointed Successor Trustee for the Bankruptcy Estate of Coastal Plains, Inc. in its Chapter 7 bankruptcy. That bankruptcy was Case No. 383-31299 and was filed in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division.

I was not the original trustee in the bankruptcy nor was the case originally a Chapter 7 bankruptcy. In connection with my appointment, I did go back and ascertain that the bankruptcy had originally been filed as a Chapter 11 on April 21,1986 and converted to Chapter 7 on April 3,

1987. The original Chapter 7 trustee was Duke Salisbury. I was appointed to replace Duke Salisbury, as he had moved away from Dallas and was winding down his bankruptcy work.

When I became bankruptcy Trustee of the Bankruptcy Estate of Coastal Plains, Inc., I made myself familiar with the history of the case, the Schedules and some litigation to which the bankruptcy estate was a party. The litigation was Civil Action No. 3-94-CV-1325-P; *Industrial Clearinghouse, Inc. and Duke Salisbury, Trustee of the Bankruptcy Estate of Coastal Plains, Inc. v. Browning Manufacturing, a division of Emerson Electric Company.*

That litigation was ultimately unsuccessful as reported in its appeal to the Fifth Circuit at 179 F3d 197. The Plaintiffs, myself as Trustee, and Industrial Clearinghouse, Inc., applied for a writ of certiorari to the Supreme Court to review that decision of the Fifth Circuit. That writ was denied in January, 2000. Sometime after the writ was denied, I had a face-to-face meeting with Wayne Duke and an attorney (I believe it was Jody Sheets) to discuss my pursuing, as Trustee of the Bankruptcy Estate of Coastal Plains, Inc., claims for legal malpractice against Jackson Walker L.L.P. At that time, I did not agree I would enter into an arrangement with Industrial Clearinghouse, Inc. but I did agree to consider the matter. I was familiar with the facts of the bankruptcy. I consulted with my counsel for the bankruptcy estate about pursuing a malpractice action against Jackson Walker L.L.P. After discussions with counsel, I decided I would not pursue such a claim either solely on behalf of the bankruptcy estate or in some arrangement with Industrial Clearinghouse, Inc.

Thereafter, on March 2, 2000, I filed the Trustee's Final Report and Proposed Distribution. An objection was filed by Browning Manufacturing and, on May 30, 2000, I filed the Amended Trustee's Report of Final Account and Application to Close Case and Discharge Trustee. The Order Approving Final Account & Report Granting Application for Compensation was signed on June 2, 2000. On December 8, 2000, the United State's Trustee's Office filed my Trustee's Report of Final Account and Application to Close Case and Discharge Trustee. An Order approving that report and discharging me was signed on December 12, 2000.

/s/ Jeffrey H. Mims, Trustee
JEFFREY H. MIMS,
TRUSTEE

SUBSCRIBED AND SWORN to before me, the undersigned authority, this 31st day of May, A.D. 2002.

/s/ Shirley P. Meyer
NOTARY PUBLIC in and
for the State of Texas

My Commission Expires: [SEAL] SHIRLEY P. MEYER
Notary Public,
State of Texas
My Commission Expires
03-19-05

3-19-05

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ATTORNEYS FOR MOVANT
INDUSTRIAL CLEARINGHOUSE, INC.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

IN RE:	)	Case No.
	)	386-31299-HDH-7
COASTAL PLAINS, INC.	)	(Chapter 7)

ICHI'S MOTION FOR CLARIFICATION OR RECONSIDERATION WITH SUPPORTING AUTHORITIES

(Filed Aug. 22, 2003)

NOW COMES Industrial Clearinghouse, Inc., ("ICHI") and respectfully requests that this Court clarify, or alternatively reconsider, its August 12, 2002 "Order Denying

Motions for Appointment of Trustee and Motion for Abandonment of Claims and Closing Bankruptcy Case" ("the Order") for the following reasons:

I.

Summary of Argument

1.01 ICHI does not seek a "second bite at the apple." Instead it seeks a clarification as to the whereabouts of the apple.

1.02 The bankruptcy estate was closed as a "no asset" estate based upon a certification to this Court by the U.S. Trustee that "[n]o . . . assets of the estate remain." (See subject Opinion.) Yet Jackson Walker has contended, and a State Court has held in an interlocutory order, that a substantial cause of action for malpractice does remain in the closed "no-asset" estate. The Court's Opinion neither resolves nor clarifies this obvious contradiction. However, the case law suggests that this is precisely the kind of situation that merits a reopening of the closed bankruptcy estate.

> "[A] debtor may with to re-open a case for a variety of . . . reasons, such as *to . . . clarify whether a given asset has or has not been abandoned*, or the like." *In re Musgraves*, 129 B.R. 119, 131 at fn. 5 (Bankr. W.D. Texas, San Antonio Div. 1991); in accord, *In re Guzman*, 130 B.R. 489, 491 at fn. 3 (Bankr. W.D. Texas, San Antonio Div. 1991).

1.03 The decision on whether to re-open can not turn, as the Opinion suggests, on whether the asset was disclosed or undisclosed to the Trustee. This part of the Court's Opinion leads to a bizarre conclusion – if ICHI had

not scheduled this claim, had not made a point of following up the scheduling with a face-to-face meeting with the Trustee, and instead, had secreted this cause of action, then grounds to re-open and appoint a Trustee would exist according to the order.

1.04 Instead, the issue primarily turns on whether the asset/claim has been "administered." "The court has the duty to reopen an estate whenever prima facie proof is made that it has not been fully administered." *Kozman v. Herzig*, 96 B.R. 264, 266 (1989); see also *In re Lopez*, 283 B.R. 22, 27 (2002). It is an abuse of discretion to deny a motion to reopen where an asset of substance exists in the closed estate. *Id.*

1.05 The Opinion suggests that ICHI "is not happy with the Trustee's decision regarding the administration of one of the estate's alleged assets." This is not accurate, nor it is [sic] supported by pleadings or the record. ICHI does not necessarily find itself disagreeing with the apparent conclusion by the Trustee not to pursue the claims for the estate as will be hereinafter explained.

1.06 Contrary to the opinion, however, the record establishes that the Trustee did not "administer" this claim. The term "administer" under the Code is defined "as the liquidation or utilization of an asset." *Starrett v. Starrett*, 541 A.2d 1119, 1121 (Attachment 1). For whatever reason, the Trustee took no action with respect to this scheduled asset. It is an error of law and fact to conclude that "no action" equals "administer."

1.07 The critical issue not addressed in the Opinion is what happened to this scheduled asset when the Court closed the bankruptcy estate. The Court's Opinion refers to the portion of the Trustee's Final Report filed March 2,

2000, which indicates that the "Lawsuit Inc." was valued at zero and was fully administered. This obviously refers to the Browning litigation which was fully litigated to the U.S. Supreme Court and resulted in zero recovery for the estate. No "lawsuit" at that time was pending against Jackson Walker. Other than representing that there were no assets, the Final Report does not address in any way the scheduled claim against Jackson Walker. As ICHI has always argued, this results in the triggering of Section 554(c) which reads in pertinent part as follows:

> Unless the court orders otherwise, any property scheduled under *section 521(1)* of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title. [*11 U.S.C. § 554(c)*; emphasis supplied].

1.08 The lack of active administration of the asset at the time of the closing of the bankruptcy estate imputes on behalf of the Trustee an intent to abandon. *Starrett v. Starrett*, 541 A.2d 1119, 1122. The abandonment is automatic and does not need to be accompanied by a request for abandonment by the Trustee or an Order by the Court. *Id.*

1.09 A fair review of the Trustee's actions suggests that he concluded, for whatever reason, that he did not want to take on Jackson Walker, a major lawfirm, in a malpractice action. He simply took no action and closed the estate. ICHI has no quarrel with the decision because under operation of Section 554(c) this cause of action, to the extent owned by the Estate, was abandoned and could thus be prosecuted by the debtor which is what has been done. Under these circumstances there was no reason or cause for ICHI to contest the Final Report or the closing of

the Estate. Yet the Opinion seems to suggest that the failure of ICHI to, object to the Final Report and Closing Order bars ICHI from seeking a clarification of whether an asset remains in a "no-asset" estate, and if so, whether it should now be abandoned. There is no legal precedent to support this reasoning.

1.10 Even without the benefit of an evidentiary hearing, the record reflects that the Trustee, while aware of the claim, did not "administer" it. Thus, the claim has either been abandoned by operation of law or it remains unadministered in the closed estate. If it remains in the estate, this Court has exclusive jurisdiction over this unadministered asset. It would be error to keep the estate closed without at least holding a full hearing on the issues. Oddly enough, the Court's Opinion does not help the Debtor and does not help the creditors of the Debtor. It benefits only the tortfeasor whose malpractice prevented a substantial recovery by the estate and ICHI.

1.11 The concurring opinion *In re Lopez*, 283 B.R. 22, 33, speaks to the failure of a court to reopen an estate to deal with an asset that may be in the estate:

> **The worst thing the parties can do is to ignore the property of the estate problem. The worst thing a bankruptcy court can do is to frustrate the process by refusing to reopen and order the appointment of a trustee who can definitively deal with property of the estate.**

1.12 Even if the malpractice claim remains in the estate which ICHI does not concede and even if the same Trustee is re-appointed and reaches the same conclusion – that the estate should not proceed to prosecute the claim –

then a formal abandonment is appropriate. Any other result is inequitable and contrary to the law.

II.

Summary of Procedural History Behind the Order and Related Offer of Proof

2.01 On May 30, 2003, ICHI filed a "Motion to Reopen Case and for Determination that Appointment of a Trustee is Necessary" for the stated purpose of allowing ICHI to obtain clarification as to whether malpractice claims against Jackson Walker L.L.P. ("Jackson Walker") arising out of legal work performed for Coastal Plains, Inc., remains property of the subject bankruptcy estate, and if so, to allow ICHI to move for abandonment of the malpractice claims. The background of the malpractice claim and the justification for filing this motion is addressed in Paragraphs 3.01 to 3.30 of this Motion.

2.02 On June 4, 2003, this Court reopened the subject bankruptcy to examine the issues raised by ICHI, but did not appoint a Trustee.

2.03 On August 1, 2003, a hearing was held on a "Renewed Motion for Determination that Appointment of a Trustee is Necessary and a Motion to Abandon." Prior to the hearing no party had filed any opposition to the opening of the estate or the appointment of a Trustee. At the hearing Jackson Walker appeared and argued in favor of closing the estate and not appointing a trustee. The Court heard argument of counsel at the hearing and received an Affidavit from former trustee Jeffrey H. Mims. No other evidence was submitted to the Court.

2.04 The parties were scheduled for an evidentiary hearing on the abandonment issue on August 14, 2003. ICHI had subpoenaed Jeffrey H. Mims and others to testify. However, before this hearing the Court issued the subject Order which closed the Estate and denied the requested abandonment and all other relief sought by ICHI.

2.05 Offer of Proof

ICHI proffers the following evidence by this Offer of Proof which it would have presented to this Court at the August 14, 2003, evidentiary hearing;

- The malpractice claim against Jackson Walker was "scheduled" as that term is used in Section 521(1). (See Attachment 2.)
- The Trustee, Jeffrey Mims, was aware of the existence of the scheduled malpractice claim, but took no action in reference to the claim.
- The Trustee, Jeffrey Mims, did not "administer" the Jackson Walker malpractice claim, as that term is used and defined in Section 554(c).
- The Affidavit of Jeffrey Mims is inaccurate. (See Affidavit of Bruce Peale [Attachment 3]).
- The Trustee's Final Report filed on Marcy [sic] 2, 2000, which reflects that the "Lawsuit Int." was valued at zero and was fully administered was referring to the Browning Adversary Proceeding and not the claims against Jackson Walker. No "Lawsuit" had

yet been even filed at that time against Jackson Walker.

- The Trustee, Jeffrey Mims, reached the conclusion that the malpractice claim against Jackson Walker was not worth pursuing on behalf of the Estate in light of the cost, expense, time involved and limited resources of the Estate. The Trustee intended to abandon this claim when he certified the Estate as a "no-asset" estate.

- The prior Trustee, Duke Salisbury, had taking the position that Jackson Walker committed fraud on the Court. (See Attachment 4).

- Judge McGuire had concluded that Jackson Walker had acted improperly and engaged in a conflict of interest. (See Attachment 5, Page 12, Footnote 1, and Page 28, Footnote 4).

- ICHI's experts, which include a former District Court and Court of Appeals Judge, have opined that Jackson Walker committed malpractice in the work done for Coastal Plains.

- A partner of Jackson Walker admitted under oath in a hearing before Judge McGuire that the Browning Adversary claims should have been identified on Coastal's Schedules.

III

Background of Malpractice and State Court Suit

3.01 The above-styled case was commenced as a Chapter 11 case in April of 1986. Jackson Walker was

employed with this Court's approval as legal counsel for the debtor in possession, Coastal Plains, Inc., ("Coastal Plains") and served in that capacity throughout the. time it was a Chapter 11 case. Notable, as part of securing court approval for their employment, Jackson Walker prepared and had Coastal sign an "Application to Approve Employment of Attorney." The Application prepared by Jackson Walker and filed with this court provides, *inter alia*, that

> 4. The **professional services that the law firm** of Jackson, Walker, Winstead, Cantwell & Miller **are to render** to Applicant in this case **include:**
>
> (a) to give Applicant legal advice with respect to its powers and duties as debtor-in-possession . . .
>
> (b) to **prepare on behalf of Applicant** as debtor-in-possession necessary applications, answers, orders, **reports** and other legal papers.

3.02 Jackson Walker failed to disclose to the Court that its initial retainer came from Westinghouse Credit Corporation. This issue ultimately came to light in hearings before Judge McGuire which are hereafter referenced. Ultimately, Jackson Walker was required to disgorge its retainer.

3.03 Coastal Plains' principal secured lender was Westinghouse Credit Corporation ("Westinghouse"). Westinghouse also provided debtor-in-possession financing and received, with this Court's approval, a super priority lien on all Coastal Plains assets. Coastal Plains owed in excess of $8.5 million to Westinghouse and approximately $8 million to other creditors. Leaving aside setoff and other issues, Browning Manufacturing, formerly a division of

Emerson Electric Company ("Browning"), was Coastal Plains' largest unsecured creditor.

3.04 A week after this bankruptcy case was commenced, Jackson Walker prepared and filed an adversary proceeding on behalf of Coastal Plains against Browning ("Browning Adversary) in which Coastal Plains sought, *inter alia*, the return of valuable inventory owned by the estate. Jackson Walker, on behalf of Coastal Plains, also alleged claims and sought damages in the Browning Adversary for conversion and interference with contracts and/or business relationships. Finally, Jackson Walker, on behalf of Coastal Plains, requested punitive damages and damages for violation of the automatic stay.

3.05 Shortly after the Browning Adversary was filed, this Court, in a TRO hearing, found that Browning had violated the automatic stay and ordered Browning to return Coastal Plains' inventory. The other claims made in the Browning Adversary were not addressed at that time[1], however, in the findings of fact, this Court held that there was a probability that Coastal Plains would prevail on the merits. Jackson Walker represented Coastal Plains in this hearing.

3.06 In June of 1986, with Jackson Walker's legal assistance, Coastal Plains filed its bankruptcy schedules and statement of financial affairs. Despite having already prepared and filed the Browning Adversary on behalf of

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[1] At this hearing on May 2, 1986, Ken Stohner, partner at Jackson Walker, stated to this Court: "The issue before the Court today is the turnover of the inventory. The complaint alleges further that **damages** under both conversion, interference with relationships and punitive damages not be heard before the Court today, but **would be heard at a later hearing**.

Coastal Plains, Jackson Walker did not list any claims against Browning in Coastal Plains' bankruptcy schedules or statement of financial affairs.

3.07 In September of 1986, Westinghouse moved for relief from the automatic stay so that it could foreclose on Coastal Plains' assets. Westinghouse asserted that it was owed in excess of $8 million by Coastal; that its debt exceeded the value of its collateral; and that reorganization of Coastal Plains was not possible. Westinghouse ultimately submitted a stipulation (the "Stipulation") in support of its motion to modify the stay that included estimates of the value of Coastal Plains' assets, including that its general intangible assets consisted of computer software programs, customer lists, and vendor lists, with a total worth less than $20,000. The Stipulation did not make mention of any claims against Browning. The Stipulation showed more than a $5 million shortfall between the value of Coastal Plains' assets and its debt to Westinghouse. Although the Stipulation was initially prepared by Westinghouse, Jackson Walker was actively involved as legal counsel to Coastal Plains in finalization of the Stipulation, and signed said Stipulation on behalf of Coastal Plains.

3.08 At the time the Stipulation was signed, Jackson Walker was representing Coastal in the Bankruptcy, Coastal in the Adversary Proceeding against Browning, and also agreed to represent ICHI in conjunction with contractual arrangements between Westinghouse and ICHI relating specifically to the Coastal assets being foreclosed upon. Jackson Walker's conflict of interest in wearing so many hats is a matter which was addressed by Judge McGuire as hereafter noted.

3.09 The day after the Stipulation was filed, Westinghouse's motion to lift the stay was granted and Westinghouse foreclosed on Coastal Plains' assets through an auction conducted in October of 1986, Westinghouse was the successful bidder at the auction and purchased all assets sold for $3.25 million.

3.10 In February of 1987, ICHI purchased for $1.24 million certain of the assets Westinghouse acquired from Coastal Plains through the auction. The assets ICHI purchased expressly included "potential cause of action. against Browning."

3.11 In April of 1987, this case was converted to a Chapter 7 case.

3.12 Upon conversion of this case to Chapter 7, Duke Salisbury was appointed as trustee, qualified, and served in that capacity until his resignation.

3.13 In October of 1988, ICHI was substituted for Coastal Plains as the plaintiff in the Browning Adversary. ICHI filed its first amended complaint in the Browning Adversary in March of 1989, alleging that Browning's breach of the pre-petition inventory return agreement and delay in returning Coastal Plains' inventory caused Coastal Plains' bankruptcy and demise; and asserting claims for breach of contract, conversion, interference with contracts and/or business relationships, fraud, and violation of the automatic stay. A second amended complaint was filed in the Browning Adversary in late 1989; a third, in early 1992.

3.14 Upon Duke Salisbury's resignation as trustee in this case, Jeffrey H. Mims (the "Trustee") was appointed

as trustee, qualified, and served in that capacity until this case closed.

3.15 The Browning Adversary was set for trial in May 1993 in the United States District Court for the Northern District of Texas, Dallas Division (the "Federal District Court"), which had withdrawn the reference from this Court. But, on the eve of trial, the Trustee moved to intervene, claiming that Coastal Plains' bankruptcy estate owned the claims being pursued against Browning. The Federal District Court referred the case to this Court for a determination who owned the claims being asserted in the Browning Adversary.

3.16 In this Court, Browning asserted, *inter alia*, that, based on the nondisclosure of claims against Browning in Coastal Plains' bankruptcy schedules and the Stipulation, ICHI and the Trustee were equitably and judicially estopped from pursuing those claims. Regarding judicial estoppel, ICHI responded that the claims had been omitted through Jackson Walker's oversight.

3.17 The Trustee, Duke Salisbury, took a very aggressive position that the actions of ICHI and Jackson Walker constituted a fraudulent conspiracy and fraud on the Court. Pertinent portions of the Trustee's allegations read as follows:

> "The principals of CPI and Westinghouse entered into a conspiracy to transfer the assets of CPI to the newly formed ICHI which was to act as Westinghouse's agent in disposing of its collateral in return for 65% of the proceeds (*see* Browning Trial Exhibit "18" and Trustee Trial Exhibit "Q"). Upon completion of the conspiracy, the principals of CPI, were able to reacquire CPI's assets outside of the Chapter 11 process. ICHI was formed

> on March 4, 1986, approximately six weeks prior to the commencement of CPI's case, with CPI's president, R. Wayne Duke, serving as ICHI's registered agent and CPI's address as its registered office listed with the Secretary of State. **It appears that ICHI's incorporator was an employee of Jackson & Walker.** Ultimately, ICHI purchases most of CPI's assets from Westinghouse at a small fraction of CPI's cost. These purchases occurred in early 1987 after foreclosure by Westinghouse in late 1986, authorized by the Stay Order. The purchases were less than ten months after commencement of CPI's Chapter 11 proceeding. It appears that CPI's Chapter 11 case was merely a link in the chain of events, the purpose of which was to put trade creditors at bay by means of the automatic stay while CPI transferred its assets to its principals and ICHI outside of the Chapter 11 process."

See Trustee's Motion and Memorandum for Relief from Orders Pursuant to Bankruptcy Rule 9024 which is included as Attachment 4.

3.18 A hearing was conducted before Judge McGuire in July 1993. Testimony by the bankruptcy attorney for Coastal, who was also the initial attorney for Coastal in the Browning Adversary Proceeding (Ken Stohner) was later noted by the 5th Circuit *In the matter of Coastal Plains, Inc.* 179 F.3d 197 as follows:

> **As Coastal's bankruptcy attorney admitted at the July 1993 bankruptcy court hearing, it is very important that a debtor's bankruptcy schedules and statement of affairs be as accurate as possible, because that is the initial information upon which all creditors rely.**

> **But, at that July 1993 hearing, Coastal's bankruptcy attorney testified that the adversary proceeding against Browning was a contingent or unliquidated claim that should have been included on Coastal's schedules; and conceded that Coastal's debt to Browning "probably" should have been listed as being disputed. Although the attorney testified that it was his firm's policy to discuss schedules with clients, he did not recall his specific involvement in preparing the schedules, could *not* recall any discussions with Young or Duke about the claims against Browning, and could *not* testify as to why the adversary proceeding was *not* listed as a contingent or unliquidated claim.**

3.19 Following the July 1993 hearing and two other related hearings, Judge McGuire issued an amended Memorandum Opinion on May 18, 1994. He ruled that the Estate owned the tort claims against Browning and that ICHI owned the contract claims. He rejected the Trustee's claim of fraud and Browning's claims of judicial estoppel. However, in doing so, he did not approve of Jackson Walker's conduct as reflected in the following excerpts from that Opinion, to wit:

> **J&W failed to disclose its conflicting relationship with ICHI to the Court at any time, through formal pleadings under Bankruptcy Rule 2014, or otherwise. This is especially bothersome in the context of the stay hearing.** (*See*, DX 82). J&W's position is not approved, but no relief against J&W was sought in this adversary, and J&W has not had the opportunity to respond by pleadings.

May 17, 1994, Bankruptcy Rule 9021 Order on Ownership of Causes of Action, Motion for Leave to Amend, Motions for Reconsideration, and Recommendations to the District Court, Page 12, Footnote 1. (Attachment 5)

> **As previously indicated, J&W's non-disclosure conduct was improper, as well as its simultaneous representation of Debtor and ICHI.** No relief was sought from J& W in this adversary.

May 17, 1994, Bankruptcy Rule 9021 Order on Ownership of Causes of Action, Motion for Leave to Amend, Motions for Reconsideration, and Recommendations to the District Court, Page 28, Footnote 4. (Attachment 5).

3.20 Ultimately, ICHI and the Trustee agreed to share any recovery against Browning, with ICHI to receive 85 percent. This Court approved the recovery sharing agreement between ICHI and the Trustee and, *inter alia*, rejected Browning's judicial estoppel argument. Browning appealed to the Federal District Court, which affirmed; and to the 5th Circuit, which affirmed approval of the sharing agreement, but dismissed Browning's appeal as to judicial estoppel, holding that the ruling was interlocutory.

3.21 The Browning Adversary was tried in the District Court in early 1996 and the jury awarded ICHI and the Trustee $5 million for breach of contract, $2.5 million for conversion, $1.75 million for breach of fiduciary duty, $1.3 million for tortious interference, and $7.5 million in punitive damages. However, the Federal District Court ordered ICHI and the Trustee to elect a recovery between the tort and contract awards; reduced the punitive damages to $4 million; and granted Browning a $1.4 million setoff.

3.22 ICHI and the Trustee elected, under protest, to recover for breach of contract, which resulted in a final judgment awarding damages of $3.6 million ($5 million for contract breach less $1.4 million setoff), and $1.6 million for attorney's fees and costs. As stated above, this Court had previously determined that the breach of contract claims upon which ICHI and the Trustee prevailed were owned by ICHI. Browning has subsequently released its claims against Coastal Plains or ICHI.

3.23 Browning appealed the judgement in the Browning Adversary and the 5th Circuit reversed and rendered judgment against ICHI and the Trustee, holding that all claims against Browning in the Browning Adversary, except for tortious interference claim, were judicially estopped because they had not been properly disclosed in Coastal Plains' bankruptcy schedules, statement of financial affairs, and the Stipulation. See *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999).

3.24 In June of 2000, a supplement to Schedule B-2 was filed on behalf of Coastal Plains that listed, *inter alia*, an unliquidated cause of action for professional malpractice against Jackson Walker. The malpractice claims was listed with an unknown value, but the estimated damages were listed to be in the approximate amount of $10,000,000. The Trustee was served with this Supplement.

3.25 In addition, after the 5th Circuit reversed and rendered judgment in the Browning Adversary against ICHI and the Trustee, a principal of ICHI and one of ICHI's lawyers met with Trustee Mims about pursuing a malpractice action against Jackson Walker for its role in matters that led to the judgment in the Browning Adversary being reversed and rendered against ICHI and the

Trustee. The Trustee affirmatively decided not to pursue such a claim either solely on behalf of the Coastal Plains' bankruptcy estate or in some arrangement with ICHI. Absolutely no action was taken by the Trustee to administer this malpractice claim.

3.26 On December 12, 2000, this case was closed and the Trustee was discharged.

3.27 ICHI has now merged with Coastal Plains, Inc. and is the surviving corporation. Thus, ICHI now stands in the shoes of Coastal Plains as to any assets abandoned to the Debtor as a result of the Bankruptcy case being closed.

3.28 In 2001, ICHI sued Jackson Walker in the District Court of Dallas County, Texas, 116th Judicial District, Cause Number 01-03461-F, for professional malpractice, both in representing ICHI prior to its merger with Coastal Plains and in representing Coastal Plains (the "Malpractice Action"). Jackson Walker has defended the Malpractice Action by contending, among other things, that any malpractice claims against Jackson Walker for its representation of Coastal Plains remain in Coastal Plains' bankruptcy estate and, therefore, could not be prosecuted by ICHI.

3.29 Attachment 6 is a transcript of a hearing by the State Court Judge which sets for his ruling and rationale for his ruling that the malpractice action relating to work done by Jackson Walker remained in the closed Coastal Plains Bankruptcy. Pertinent portions of this transcript are as follows:

> MR. LONG: What I understand is the Court has concluded that the claims – if Coastal

Plains owns any claims, that those claims, in effect, remain in limbo. They are trapped in a bankruptcy estate that is no longer in place. So essentially, this court's ruling is –

THE COURT: Right. They didn't get abandoned out –

MR. LONG: And the trustee –

THE COURT: – is really the –

MR. LONG: – the trustee has refused to do anything. He's closed the estate. So there is no estate.

THE COURT: I don't know where that –

MR. LONG: So if there is a claim, it can't be prosecuted at all. That's the end result.

THE COURT: I don't know enough – I am not enough of a bankruptcy expert to tell you that. If you tell me that, fine. I don't profess to know where it leaves you. You have chosen to call it another world. I don't know whether that's true or not. I am not a bankruptcy expert. Despite of all the reading I have done in this case, I don't see myself to be a bankruptcy expert.

January 6, 2003, Hearing Transcript, Page 15, Line 10, through Page 16, Line 8.

MR. LONG: I think I'm – perhaps I'm not doing this as artfully as I should. I am trying to focus the Court and really go back to what the original position of the parties was.

Again, implicit in the Court's analysis was that the legal malpractice claims remain in the bankruptcy estate, okay, and that as a result of

> whatever infirmity the Court has decided, that never got out of the bankruptcy estate through the abandonment process under the bankruptcy code.
>
> THE COURT: Yeah, that's the simple version.

January 6, 2003, Hearing Transcript, Page 21, Line 18, through Page 22, Line 4.

3.30 It was this ruling by the State Court Judge, who candidly admitted he was not an expert in this area of the law, that precipitated the Motion to Reopen.

IV.

Argument and Authorities

4.01 In their application to this Court for employment as counsel for Coastal Plains, Jackson Walker undertook to assist Coastal Plains in preparing necessary reports and schedules. Unfortunately, for ICHI as well as the Estate, Jackson Walker did not do their job. This legal malpractice caused the loss of a multi-million dollar judgment favoring ICHI and the Estate.

4.02 Moreover, Jackson Walker failed to make the proper disclosures with respect to their initial retainer for Westinghouse Credit. This failure, when coupled with Jackson Walker's multiple and simultaneous representation of both Coastal and ICHI lead the initial U.S. Trustee to allege fraud on the Court. Even Judge McGuire made note of Jackson Walker's improper conduct and conflict of interest. These improper actions on the part of Jackson Walker put ICHI (and Coastal) in a bad light and contributed to the reversal of the Browning Judgment.

4.03 The conclusion to be reached is that the malpractice action against Jackson Walker is a serious claim, obviously with merit, that involves substantial moneys. This is not a trivial, insignificant claim.

4.04 Rightfully or wrongfully, Jackson Walker has to date convinced a State Court Judge that the malpractice action relating to Jackson Walker's malpractice as to its legal work for Coastal, is trapped in a closed, so-called "no-asset" estate.

4.05 Assuming arguendo that the malpractice claim remains in the Estate, or possibly remains in the Estate, then the resolution of how the asset should be dealt with is within the exclusive jurisdiction of this Court. Under 28 U.S.C. 1334 (c) the federal district court, and derivatively this bankruptcy court by referral under 28 U.S.C. Section 157 (and the local referral notes), has exclusive jurisdiction over property of the Estate. Thus, it is up to this Court to decipher what has transpired in the subject bankruptcy and to sort out the effect of its previous Order closing the bankruptcy estate.

4:06 At the time this Court ordered the closing of this Estate it was certified to this court that "[n]o . . . assets of the estate remain." This is in gross contradiction to the position of Jackson Walker that the malpractice claim that had been scheduled, remained trapped in the estate. Is this really a no-asset case as represented by the Trustee and as presumably concluded by this Court? ICHI says "yes" because under operation of law, specifically Section 554(c), this only remaining asset was automatically abandoned at the closing of the Estate. Any other conclusion renders the Trustee's Certification false. Nevertheless, Jackson Walker says "no."

4.07 Whether ICHI is right or wrong about this Estate being a no-asset estate is not at this point the real procedural issue. The question at bar is simply whether this confusion should be addressed in a hearing. This Court closed the Estate without an evidentiary hearing, based primarily on the hearsay affidavit of the Trustee filed in the State Court proceeding. Strangely, this Affidavit supports ICHI's position.

4.08 Assuming arguendo the correctness of the facts stated in the Affidavit, two important points can be distilled. First, it is without doubt that the Trustee was well aware of this legal malpractice claim. Second, the Trustee decided to take no action to pursue the claims for the Estate. His reasoning for not pursuing the claim is not under attack by ICHI. The significant point for analysis is that the Affidavit reflects that he did not "administer" the claim under the Code.

4.09 "Administer" under the Code means "the liquidation or utilization of an asset." *Starrett v. Starrett*, 541 A.2d 1119. The *Starrett* decision is instructive. In that case the Trustee actually "administered" the asset in question by trying to collect on the asset. However, the court noted that some prior administration over the asset did not prevent the application of Section 554(c). Instead, the appellate court opined that the language of Section 554(c) focuses on whether there is active administration of the asset "at the time of the closing of a case." *Id.* at 1122. The court in Starrett held that the asset had been abandoned as follows:

> "[W]here the trustee has knowledge that is sufficient to put him upon diligent inquiry as to the subject asset, the abandonment is held to have been knowingly made and hence is irrevocable."

> *Atkinson, 62 B.R. at 680, citing In re Tarpley. 4 B.R. 145 (Bankr.M.D.Tenn. 1980).*
>
> Here, the trustee had more than just inquiry knowledge. He, in fact, indicated to the lower court that he made attempts to collect on the judgment and decided to abandon pursuit of the judgment in the Bankruptcy Court. Therefore, we conclude the trustee had knowledge of the asset and clearly intended to abandon the asset prior to the close of the bankruptcy estate.

The same analysis and result should follow in this case.

4.10 ICHI's position is elementary: "no action" by the Trustee with references to the legal malpractice claim can not under any view of the law constitute "administering" the claim. Any conclusion to the contrary rises to the level of abuse of discretion.

4.11 At best, the Trustee "considered" the merits of the claim but did not at any time administer it. ICHI was prepared to explore the Trustee's rationale and thought process in the scheduled evidentiary hearing. If, for example, the Trustee concluded that there was little or no value to the claim or that an estate with no other assets was not in a position to pursue the claim, then regardless, such reasoning would constitute prima facie proof of the elements necessary for this Court to concur with the Trustee's original evaluation and alternatively abandon the claim under Section 554(b).

4.12 Strangely enough, the position of ICHI is that the Trustee was correct in closing this Estate as a no-asset estate, but if a foul-up in paperwork in the closing of the Estate prevented an abandonment, then ICHI was prepared to embrace the decision process of the Trustee in the

Section 554(c) alternative motion. Yet the Court's Opinion suggests that ICHI is out to second guess the Trustee and secure a second bite at the apple.

4.13 Some party, either the Estate of [sic] the Debtor, is entitled to prosecute the subject malpractice claims. Only the wrongdoer benefits from the Court's action to close the Estate in face of the State Court's interlocutory ruling. If there is an asset in the Estate which involves potentially millions of dollars, that asset must be administered by the Court or abandoned.

Prayer

For the following reasons ICHI requests prompt clarification or reconsideration of the subject Order and the following relief:

1. Findings of fact and conclusions of law that confirm to what ICHI is requesting by separate motion filed simultaneously herewith. Most importantly, ICHI requests findings that the claim was "scheduled," that Trustee Mims did not "administer" the subject claim and/or was not "actively administering" the subject claim at the time of the closing of the Estate and that the effect of this Court's order closing the Estate, when coupled with these factual findings, is to trigger an abandonment of the subject claim under Section 554(c).

2. Alternative, to re-open the Estate and conduct an evidentiary hearing to determine if the subject claim remains in the Estate and, if so, whether is should be abandoned.

3. And for such further relief to which it may be entitled.

Respectfully submitted,

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By: /s/ Pat Long
ATTORNEYS FOR THE
MOVANT, INDUSTRIAL
CLEARINGHOUSE, INC.

[SEAL] OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
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RE: Case No. 05-0522 DATE: 12/02/2005
COA #: 05-03-01752-CV TC#: 01-03461-1
STYLE: INDUSTRIAL CLEARINGHOUSE,
v. JACKSON WALKER, L.L.P.

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. The Motion to Stay is denied.

MAIL TO

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